No. 92-1239-CSX
Status: GRANTED

Title: J. E. B., Petitioner
v.
T. B.

Docketed:
January 21, 1993

Court: Court of Civil Appeals of Alabama

Counsel for petitioner: Porter III,John F.

Counsel for respondent: Brasfield,Lois

Supreme Ct of Alabama den ptn for review 10-23-92. Alabama Court of Appeals overrruled rehearing 7-17-92. Ptn mailed 1-20-93, holiday.

Entry	Date	Note	Proceedings and Orders
1	Jan 21 1993	G	Petition for writ of certiorari filed.
2	Feb 24 1993		DISTRIBUTED. March 19, 1993
3	Mar 8 1993	P	Response requested -- WHR. (Due April 8, 1993)
5	Mar 22 1993		Order extending time to file response to petition until April 15, 1993.
6	Apr 14 1993		Brief of respondent Alabama in opposition filed.
7	Apr 21 1993		REDISTRIBUTED. May 14, 1993
8	May 17 1993		Petition GRANTED.
			**********
10	Jun 17 1993		Order extending time to file brief of petitioner on the merits until July 15, 1993.
11	Jul 15 1993		Brief amici curiae of National Women's Law Center, et al. filed.
12	Jul 15 1993		Brief amicus curiae of United States filed.
13	Jul 15 1993		Joint appendix filed.
14	Jul 15 1993		Brief of petitioner J.E.B. filed.
15	Jul 26 1993		Record filed.
		*	Original proceedings Supreme Court of Alabama and Court of Civil Appeals.
16	Jul 26 1993	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
18	Jul 29 1993		Order extending time to file brief of respondent on the merits until September 3, 1993.
19	Sep 2 1993		Brief of respondent Alabama filed.
20	Sep 8 1993		CIRCULATED.
21	Sep 10 1993		SET FOR ARGUMENT TUESDAY, NOVEMBER 2, 1993.(1ST CASE).
22	Sep 24 1993		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
23	Oct 4 1993	X	Reply brief of petitioner filed.
24	Oct 25 1993	X	Supplemental brief of respondent filed.
25	Nov 2 1993		ARGUED.

(1)

92-1239
NO.

Supreme Court, U.S.
FILED
JAN 21 1993
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

Ex parte J.E.B.

(Re: J.E.B.

vs.

State of Alabama, Ex rel T.B.)

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF ALABAMA

PETITION FOR WRIT OF CERTIORARI

John F. Porter, III
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COUNSEL FOR PETITIONER
P. O. Box 1108
Scottsboro, AL 35768
(205) 259-1919

61 pp

ISSUES PRESENTED FOR REVIEW

The single issue presented to this Court for review is whether a male defendant in a paternity action brought by the State of Alabama, has the right, under the Equal Protection clause of the 14th Amendment to the United States Constitution, to challenge the State's use of its peremptory jury strikes to exclude all males from the jury panel. The same question, presented in another way is whether or not peremptory jury strikes based upon a perspective juror's gender is discriminatory, such that, upon challenge by the opposing party, the procedures established by this Court in Batson vs. Kentucky, 476 U.S. 79, 90 L Ed 2nd 69, 106 S Ct 1712 (1986) would apply.

PARTIES TO THE PROCEEDING

Petitioner: James E. Bowman, Sr.

Respondent: State of Alabama, Ex rel. Teresia Bible

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CITATION OF OFFICIAL REPORT

Certiorari to the Alabama Supreme Court is sought from the following opinion:

J.E.B. vs. State of Alabama, Ex rel T.B., _____ So. 2d _____ (Ala. Civ. App., 1992), cert denied _____ So. 2d _____ (1992).

JURISDICTIONAL GROUNDS FOR PETITION

Jurisdiction for review by this Court is invoked by your Petitioner pursuant to 28 USC §1257(3). The holding of the Circuit Court of Jackson County, Alabama, as affirmed by the Alabama Court of Civil Appeals, with certiorari denied by the Alabama Supreme Court, denies the Petitioner his rights to the Equal Protection of the laws under the 14th Amendment to the United States Constitution. In holding that the Petitioner did not have the right to invoke the procedures set out by this Court in Batson vs. Kentucky, 476 U.S. 79, 90 L Ed 2nd 69, 106 S Ct 1712 (1986), on his challenge to the use of the State's peremptory jury strikes based solely upon gender, the State Court's decisions conflict with the 9th Circuit Court of Appeals decision in U. S. vs. De Gross, 913 F. 2d 1417 (9th Cir. 1990).

STATEMENT OF THE CASE

This action is a paternity case originating in the Circuit Court of Jackson County, Alabama upon the Petition of the State of Alabama, ex rel T.B , alleging that J.E.B. was the father of a child born to T.B. The matter was called for trial on October 21, 1991 and the Court proceeded to empanel a jury. After voir dire by the Court and all parties, the jury was struck. Before the jury was empaneled, your Petitioner challenged the State's use of its peremptory strikes to eliminate all of the male jurors from the panel based solely upon their gender, in violation of the Equal Protection clause of the 14th Amendment to the United States Constitution. In making such objection, your Petitioner was requesting the Trial Court to conduct a proceeding to determine the discriminatory nature of the State's use of its peremptory strikes. The Court overruled your Petitioner's objection and denied its

request to follow the procedures established by this Court in Batson vs. Kentucky, 476 U.S. 79, 90 L Ed 2nd 69, 106 S Ct 1712 (1986).

Specifically, prior to the jury being empaneled, your Petitioner made the following challenge to the State's strikes:

MR. PORTER: Judge, before the jury is empaneled, I propose to the Court that I do not know the appropriate method to do this, we would challenge the State's strikes on the *Batson* decision and other decisions that have followed that I have heard and understand that gender based strikes based upon gender are just as [in]valid on race strikes based upon the race--the State strikes with the exception of one were males. Virtually none of them answered any questions whatsoever which would show prejudice or bias in any way, and I submit to the Court that they were basically struck solely upon gender.

THE COURT: You're talking about gender strikes?

MR. PORTER: Yes, sir. Gender strikes. Again, I propose to the Court that I don't know exactly how to do this. I have never done it especially on gender.

THE COURT: You are not raising a race question? I am going to deny your motion--your challenges--on the jury that's been empaneled on the basis of gender strikes.

MR. PORTER: We would also point out to the Court that the venire is made up of approximately seventy-five percent women, which also adds to the fact that he has struck all but one of the men.

THE COURT: For the record, I will relate that there were 62 jurors on this morning's voir dire, and I did not need all 62 so I instructed the Clerk to take every other name until we got 36. That's the way these people wound up where they are. I overrule your objection and deny your motion.

(A jury was sworn and empaneled.)

(Reporter's Transcript Page 37)

Thereafter, a jury consisting of 12 females was empaneled and the case proceeded to trial. Numerous objections and challenges to the State's expert witness were made and each in turn, overruled by the Court. At the conclusion of the trial, the jury found and determined J.E.B. to be the

father of the child, and the Court entered judgment thereon.

Your Petitioner subsequently filed a Post-Judgment Motion requesting an Order of Judgment Notwithstanding the Verdict, or in the alternative, a New Trial. As a portion of the grounds for such Post-Judgment Motion, your Petitioner again raised the defendant's right to Equal Protection of the law as guaranteed by the United States Constitution. Your Petitioner challenged the State's use of its peremptory strikes to strike all the males from the jury panel. Your Petitioner further challenged the Court's failure to require the State to articulate a nondiscriminatory reason for challenging the jurors, in accordance with the procedures established by this Court in Batson vs. Kentucky, 476 U.S. 79, 90 L Ed 2nd 69, 106 S Ct 1712 (1986). In denying your Petitioner's Post-Judgment Motion, the Trial Court specifically held "that the *Batson* doctrine does not extend to gender

based strikes".

Thereafter, on January 24, 1992, your Petitioner gave Notice of Appeal to the Alabama Court of Civil Appeals from the Court's Orders establishing paternity. Your Petitioner submitted the following issue to the Alabama Court of Civil Appeals:

> "The Trial Court erred in failing to allow the Appellant to challenge the State's peremptory jury challenges based solely upon gender in violation of his rights to equal protection of the law."

In affirming the Trial Court's holding, the Court of Civil Appeals opined that the Alabama Supreme Court had "declined to extend the Batson principle to gender based strikes", based upon the decision of Murphy vs. State, 596 So. 2d 42 (Ala Crim App, 1991), cert denied 596 So. 2d 45 (1991). Thereafter, on July 17, 1992, the Alabama Court of Civil Appeals denied your Petitioner's Application for Rehearing.

On July 31, 1992, your Petitioner filed his Petition for Writ of Certiorari to the

Court of Civil Appeals, in the State of Alabama Supreme Court. Your Petitioner again presented the issue of gender based jury strikes to the Court and specifically stated as follows:

> "The Petitioner seeks to have this Court reconsider and overrule the majority opinion in Murphy vs. State, 596 So. 2d 42 (Ala Civ App, 1991), cert denied 596 So. 2d 45 (1991), and to adopt as the majority opinion the reasoning issued by Justice Maddox in his dissent which strikes down jury based peremptory jury challenges."

On October 23, 1992 the Alabama Supreme Court denied your Petitioner's Writ of Certiorari to the Alabama Court of Civil Appeals.

This Petition for Writ of Certiorari is now presented to this Court.

ARGUMENT

The single issue presented to this Court for review is whether a male defendant in a paternity action brought by the State of Alabama, has the right, under the Equal Protection clause of the 14th Amendment to the United States Constitution, to challenge the State's use of its peremptory jury strikes to exclude all males from the jury panel. The same question, presented in another way is whether or not peremptory jury strikes based upon a perspective juror's gender is discriminatory, such that, upon challenge by the opposing party, the procedures established by this Court in Batson vs. Kentucky, 476 U.S. 79, 90 L Ed 2nd 69, 106 S Ct 1712 (1986) would apply.

The United States Court of Appeals, Ninth Circuit in the decision of United States vs. De Gross, 913 F. 2d 1417 (9th Cir 1990), was presented the same issue for review. They stated the question as "whether the principles established in

Batson compel us to prohibit the exercise of peremptory challenges on the basis of the venire persons gender. 913 F. 2d at 1421. That Court concisely held that "Equal Protection principles prohibit peremptory challenges exercised on the basis of venire persons gender". 913 F. 2d at 1423. In a well reasoned opinion, that Court concluded that the "mere existence of discriminatory practices in jury selection 'casts doubt on the integrity of the whole judicial process'" 913 F. 2d at 1421, citing Peters vs. Kiff, 407 US 493, 502-503, 92 S Ct 2163, 2168-69, 33 L Ed 2d 83 (1972). In reviewing the *Batson* principles as they might apply to gender based discriminatory peremptory challenges, the Court reviewed the differences between racially based discrimination and gender based discrimination. After an extensive review the Court determined that gender based discrimination in the use of peremptory jury challenges was not "substantially related to

achieve an important governmental interest" and, therefore, were prohibited by the Equal Protection principles of the United States Constitution. The Court found that gender based discrimination has the same adverse effects upon the jury selection process as does racially based discriminatory challenges. Neither a persons race nor their gender should automatically exclude that person from serving upon a jury panel. Neither form of discrimination can be tolerated when a fair and open judicial process is the object sought to be achieved.

The Ninth Circuit revisited the same question in Diaz vs. Sky Chiefs, Inc., 948 F. 2d 532 (9th Cir, 1991). Upon further review after remand for reconsideration by this Court, Sky Chiefs, Inc. vs. Diaz ____ U.S. _____, 111 S Ct 2791, 115 L Ed 2d 965 (1991), the Ninth Circuit refused the relief sought because the Petitioner's objection to the jury selection process was held to be untimely. Such is not the case in the

Petition presently before the Court. Your Petitioner made an objection and challenge to the use of the State's peremptory challenges to exclude the males from the jury, at the earliest possible moment. The challenge was made after the striking process was finished but before the jury was empaneled and the remainder of the venire discharged. Under the Alabama jury selection process, a panel of prospective jurors (in this case a panel of 36) is presented to both counsel. In both civil and criminal cases, each side is then allowed to strike jurors from the list, alternating between them, until the panel of 12 jurors remains. Therefore, the first reasonable opportunity to raise an objection to an opponent's use of their peremptory strikes is after the jury is struck and before it is empaneled.

In this paternity action, the Respondent herein was represented by counsel for the State of Alabama. A panel of 36

jurors was presented by the Court as a prospective jury panel. Of that panel, 24 were females and 12 were males. Three of these jurors were struck for cause, being two males and one female, thereby leaving a panel of 33 jurors consisting of ten males and 23 females. The State was allowed ten peremptory strikes, exercising nine of them to strike male jurors. Such use of peremptory challenges by the State resulted in a jury consisting of all females.

After the jury was struck but before it was empaneled by the Court, your Petitioner challenged the State's use of gender based strikes, encompassing the principles set out by the Supreme Court of the United States in Batson vs. Kentucky, 476 U. S. 79, 90 L Ed 2d 69, 106 S Ct 1712 (1986). The Court denied your Petitioner's objection or challenge to the State's use of preemptory strikes to exclude virtually all the males from the jury.

Such issue was again raised by your

Petitioner in its Post Trial Motion. The Appellant objected to the State's use of its peremptory strikes based upon gender, upon the grounds that such use of its peremptory strikes violated the Appellant's right to Equal Protection of the law as guaranteed by the 14th Amendment of the United States Constitution and the Constitution of the State of Alabama and also his due process rights. The Trial Court ruled in denying your Petitioner's Post Trial Motion that the "Batson doctrine does not extend to gender based strikes".

Beginning with the Batson vs. Kentucky decision, this Court established the principle that discriminatory based peremptory jury strikes violate the Equal Protection provisions of the 14th Amendment to the United States Constitution. This prohibition has been extended to both criminal trials and civil trials. Emondson vs. Leesville Concrete Co., _____ U.S. _____, 111 L Ed 2d 660, 111 S Ct 2077

(1991); Fludd vs. Dykes, 863 F. 2nd 822 (11th Cir.), cert. denied, 110 S. Ct. 201 (1989); Thomas vs. Diversified Contractors, Inc., 551 So. 2nd 343 (Ala. 1989).

The Petitioner's challenge and objection to the State's use of its peremptory strikes is based upon the premise that the use of peremptory strikes solely upon a person's gender are prohibited by the Equal Protection clause of the 14th Amendment to the United States Constitution. Such rights are designed to assure the party to a criminal trial or civil litigation that the trial will be fair and impartial. In this case, the issue was placed squarely upon the shoulders of the trial judge for his determination and the same was rejected.

The issue of whether or not gender based strikes are prohibited has been addressed by the Appellate Courts of Alabama with results which conflict with the Ninth Circuit's opinion in De Gross. The majority opinion of the Court of Criminal Appeals and

the Supreme Court at this time reflects that gender based strikes are not prohibited by the principles set out in Batson vs. Kentucky. Murphy vs. State, 596 So. 2d 42 (Ala. Civ. App., 1991) cert denied, 596 So. 2d 45; Fisher vs. State, 587 So. 2nd 1027 (Ala. Crim. App. 1991), writ denied, 587 So. 2nd 1039 (Ala. 1991); Daniels vs. State, 581 So. 2nd 563 (Ala. Crim. App. 1990), writ denied, 581 So. 2nd 541 (Ala. 1991); Dysart vs. State, 581 So. 2nd 541 (Ala. Crim. App. 1990), cert denied, 581 So. 2nd 545 (Ala. 1991); Stariks vs. State, 572 So. 2nd 1301 (Ala. Crim. App. 1990).

The above decisions notwithstanding, there has been a strong dissent adopted by a minority of both the Court of Criminal Appeals and the Supreme Court which would extend the Batson principles to gender based strikes. In Ex parte Murphy, Supreme Court Justice Maddox offered a very strong dissent in which he was joined by Justice Adams and Justice Ingram. 596 So. 2d 45. In the same

case, Justice Bowan issued a dissenting opinion for the Court of Criminal Appeals. 596 So. 2d 44.

The exclusion of any particular group, i.e., males, from potential jury service in any case limits the community's participation in the judicial system. A paternity action is particularly sensitive to the discriminatory use of peremptory challenges to exclude males from the jury. Criminal trials and civil litigation are basically race neutral. Persons of all races may become both plaintiffs and defendants in civil actions. Yet, this Court has determined that no one may be excluded from jury service because of their race. Likewise, civil litigation is primarily gender neutral. Even sexual harassment cases may be brought by males against females, and vice versa. However, a paternity action particularly pits the female against the male, thereby establishing the man as the defendant in

such an action. Therefore, in the case at bar, the Petitioner's right to have males not to be excluded from the jury is particularly sensitive.

Once having made the challenge to the State's use of its peremptory strike to exclude the males from the jury, the Trial Court should be bound to follow the procedures set out in Batson. In the matter currently before the Court, the Trial Court determined that the Batson principles were not applicable to gender based strikes and that no such proceeding was required. The objection having been made, the Court should have inquired as to whether the State had used its peremptory strikes in a discriminatory manner. The failure of the Trial Court to follow the Batson procedure, violated your Petitioner's right to the Equal Protection of the law under the 14th Amendment to the United States Constitution and constituted a reversible error.

CONCLUSION AND PRAYER FOR RELIEF

Your Petitioner prays that this Court will grant this Petition for Writ of Certiorari to the Supreme Court of the State of Alabama and upon a full review will remand the same with instructions for compliance with the proceedings set out in Batson vs. Kentucky.

LIVINGSTON, PORTER & PAULK, P.C.

John F. Porter, III
Counsel for Petitioner
P. O. Box 1108
Scottsboro, Alabama 35768
Phone: (205) 259-1919

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing upon James H. Evans, Attorney General, Room 303, 11 S. Union Street, Montgomery, Alabama 36130, by placing the same in the United States mail, first class certified postage prepaid and properly addressed.

Done this 20 day of January, 1993.

John F. Potter, III

APPENDIX

I. Excerpts of Official Record on Appeal (Cover Sheet and Pages 35, 36 and 37)..... A-1

II. Post Judgment Motion..... A-6

III. Order on Post Judgment Motion.. A-14

IV. Opinion of the Alabama Court of Civil Appeals..... A-22

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VI. Order denying Petition for Writ of Certiorari by the Alabama Supreme Court..... A-33

STATE OF ALABAMA
IN THE CIRCUIT COURT
FOR THE COUNTY OF JACKSON
THIRTY-EIGHTH JUDICIAL CIRCUIT
CIVIL

STATE OF ALABAMA, ex rel
TERESIA BIBLE,
PLAINTIFF,
VS. CIVIL ACTION NO.:
JAMES E. BOWMAN, SR., CV-90-314
DEFENDANT /

REPORTER'S OFFICIAL TRANSCRIPT ON APPEAL

Before:

Hon. Robert L. Hodges and a jury
Scottsboro, Alabama - Monday,
October 21, 1991.

APPEARANCES:

For the Plaintiff:

William W. Tally
Assistant District Attorney

For the Defendant:

John F. Porter
Attorney at Law

Celeste O. Arnold, RPR, CSR
Official Court Reporter

(Jury struck.)

(Side-bar conference, outside jury's hearing.)

MR. PORTER: Judge, before the jury is impaneled, I propose to the court that I do not know the appropriate method to do this, we would challenge the state's strikes on the Batson decision and other decisions that have followed that I have heard and understand that gender

based strikes based upon gender are just as valid as race strikes based on the race -- the state's strikes with the exception of one were males. Virtually none of them answered any questions whatsoever which would show prejudice or bias in any way, and I submit to the court that they were basically struck solely upon gender.

THE COURT: You are talking about gender strikes?

MR. PORTER: Yes, sir. Gender strikes. Again, I propose to the court I don't know exactly how to do this. I have never done it especially on gender.

THE COURT: You are not raising a race question? I am going to deny your motion--your challenges--on the jury that's been impaneled on the basis of gender strikes.

MR. PORTER: We would also point out to the

court the venire is made up of approximately 75 percent women, which also adds to the fact that he has struck all but one of the men.

THE COURT: For the record, I will relate that there were 62 jurors on this morning's voir dire, and I did not need all 62 so I instructed the clerk to take every other name until we got 36. That's the way these people wound up where they are. I overrule your objection and deny your motion.

(A jury was sworn and impaneled.)

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT
ex rel.,TERESIA	)	FOR JACKSON COUNTY
BIBLE	)	ALABAMA
PLAINTIFF	)	CASE NO.:
VS.	)	CV-90-314
JAMES EDWARD	)	
BOWMAN	)	
DEFENDANT	)	

POST-JUDGMENT MOTION

NOW COMES the defendant herein and pursuant to Rule 50 of the Alabama Rules of Civil Procedure, does hereby move this Court for entry of an Order of Judgment Notwithstanding the Verdict or in the alternative, pursuant to Rule 59 of the Alabama Rules of Civil Procedure, does hereby move this Court for a new trial or in the alternative to alter, amend or vacate the Judgment entered by this Court on the 23rd day of October, 1991 and the Order of Support dated November 8, 1991 and in support thereof does hereby say as follows:

1. The verdict of the jury and judgment entered thereon is against the great weight of the evidence.

2. The verdict of the jury and the judgment entered thereon is contrary to Alabama law and the facts presented to the Court.

3. The Court erred in denying the defendant's objection to the State's unconstitutional, gender based peremptory jury challenges.

4. The verdict of the jury and the judgment entered thereon is void in that the defendant's fifth amendment right to equal protection of the law was violated by the State's exercising its peremptory jury challenges based solely upon gender.

5. The jury as impaneled containing all females, violated the

defendant's right to equal protection of the law as guaranteed by the Fifth Amendment of the United States Constitution.

6. The State's use of peremptory jury challenges, eliminating all males from the jury, violated the defendant's Fifth Amendment right to equal protection of the laws.

7. After the defendant's objection to the State's use of peremptory strikes exercised against male members of the jury, the State failed to articulate a nondiscriminatory reason for challenging the jurors related to the particular case to be tried.

8. The Court erred in failing to require the State to articulate a nondiscriminatory reason for challenging the jurors related to this particular case.

9. The Court erred in allowing the State's witness to testify regarding the results of paternity blood tests without

first laying the proper predicate.

10. The Court erred in allowing the State's witness to testify regarding the "composite" paternity blood test results, without first laying the proper predicate.

11. The Court erred in allowing the State's witness to testify regarding the "composite" blood test results, without first establishing a scientifically reliable basis for such composite results.

12. The Court erred in allowing the State's witness to testify regarding the use of a DNA Test without first determining the admissability of such tests in accordance with the holding of the Supreme Court of the State of Alabama found in ex parte Waylon Dwight Perry _____ So. 2d _____ 1991, 89-1534).

13. The Court erred in allowing the State's witness to testify regarding the results of the paternity blood test without first establishing that such tests were generally accepted in the scientific community.

14. The Court erred in allowing the State's witness to testify regarding the results of paternity blood tests without requiring the State to first establish that the techniques used for such tests were capable of producing reliable results and that they are generally accepted in the scientific community.

15. The Court erred in allowing the State's witness to testify regarding the results of paternity blood tests without first establishing the testing laboratory performed generally accepted scientific techniques without error in the performance or interpretation of the tests.

16. The Court erred in allowing the

State's witness to testify regarding paternity blood testing without first establishing the minimal foundation of predicate including the establishment of a chain of identification from the time blood samples were taken to the time the samples were analyzed, by first hand knowledge of the witness.

17. The Court erred in sustaining the State's objection to the defendant's testimony regarding his impotency or sterility.

18. The Court erred in denying the defendant's motion for directed verdict at the close of the State's evidence.

19. The Court erred in denying the defendant's motion to exclude the State's evidence, or portions thereof, at the close of the State's case.

20. The Court erred in denying the defendant's motion for directed verdict at the close of all the evidence.

21. The Court erred in denying the defendant's motion to exclude the State's evidence, or portions thereof, made at the close of all the evidence.

WHEREFORE, the defendant does hereby pray that this Court will enter an Order of Judgment Notwithstanding the Verdict in the defendant's favor on all issues, or in the alternative to grant to the defendant a new trial on all issues or to alter, amend or vacate the Judgment in accordance with this Motion.

LIVINGSTON, PORTER & PAULK, P.C.

/S/
John F. Porter, III
Attorney for Defendant
P. O. Box 1108
Scottsboro, Alabama 35768
Phone: (205) 259-1919

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Post-Judgment Motion upon William W. Tally, Esq., P. O. Box 923, Scottsboro, Alabama 35768, by placing the same in the United States mail, first class postage prepaid and properly addressed.

Done this 23 day of November, 1991.

/S/
John F. Porter, III

FILED IN OFFICE
THIS DATE

91 NOV 23 PM 1 13

LEONARD V. GRIGGS
CIRCUIT COURT CLERK

THIRTY-EIGHTH JUDICIAL CIRCUIT OF ALABAMA

IN THE CIRCUIT COURT OF

JACKSON COUNTY, ALABAMA

STATE OF ALABAMA, ex rel., TERESIA BIBLE, PLAINTIFF	)	
VS.	)	CIVIL ACTION NO.
JAMES EDWARD BOWMAN, DEFENDANT	)	CV-91-314

ORDER ON RULE 59 MOTION

This court has reviewed the motion of the defendant under Rule 59 and has reviewed the voir dire conducted on trial of this cause, and the affidavit of counsel for the defendant reflecting the manner in which the jury was impanelled.

The argument of the defendant that he was entitled to have the jury venire quashed in that it was improper of the court to overrule his Batson challenge on the basis

of gender exclusion is not well taken. Defendant cites the United States Court of Appeals Ninth Circuit case of U. S. V. DeGross, 913 Fed. 2d 1417 (1990), and contends that it is authority for applying Batson v. Kentucky, 90 L.Ed 2d 69 (1986) to gender discrimination. At trial, the court denied the defendant's Batson challenge and did not require the state's attorney to explain his peremptory challenges of male jurors. It is uncontradicted that there were twelve male persons in a jury venire of thirty-six. Two of those jurors were excused for cause by the court, and they were Randall Sullivan, Dennis Young, and Brenda Sealey, contrary to the affidavit of defendant's counsel which identifies David Cooper as one of the jurors which were removed for cause by the court. Nevertheless, of the remaining thirty-three jurors, ten were male jurors. The defendant was allowed eleven peremptory challenges, and the state was allowed ten peremptory

challenges. Nine of the state's peremptory challenges were exercised as to male jurors, and one of the defendant's peremptory challenges was exercised as to a male juror. The resulting jury which was impaneled for the trial and which heard the evidence consisted of all females. The Ninth Circuit Court of Appeals opinion to the contrary, this court is of the opinion that the correct law in this state is as announced by the Alabama Court of Criminal Appeals in Murphy v. State, _____ So. 2d _____ (Court of Criminal Appeals _____ October 11, 1991). In that case it was held that the Batson doctrine does not extend to gender-based strikes.

Another argument of the defendant is that testimony of Dr.

Leigh Ann Harmon was improperly admitted to express opinions regarding "composite" paternity blood test results without a proper predicate being laid. The court has examined the witness's testimony and, first of all, is of the opinion that the DNA test involved as one of the three tests made under the supervision of the witness was not the same test in which the Supreme Court of Alabama addressed its six point review test in the Ex Parte Perry case. The witness explained that the DNA paternity test is "entirely different" from the DNA forensic test which the Supreme Court of Alabama in the Perry case addressed. Transcript, page R-56, 57. The court is of the opinion that the proper predicate was laid for the opinion being expressed by the witness, and that any objection to that opinion goes to the weight of the witness's opinion and not to its admissibility.

The defendant argues that the chain of custody of the blood samples which were tested was not sufficiently shown as a predicate in order to permit test results to be given in evidence. It is the opinion of the court, upon review of the testimony, that the test samples were taken in the manner contemplated by the statute, §26-17-12, Code of Alabama, 1975, as amended. In the opinion of the court, the predicate laid by the state's direct examination of the witness met the requisite foundation outlined by the court in Lyle v. Eddy, 481 So.2d 395 (1985), and the argument of the defendant as to the chain of custody of the blood samples, under the evidence adduced, including the photographs and the fingerprints of the parties from whom the samples were taken, goes to the weight of the evidence and not to its admissibility. There was first hand testimony from more than one witness that blood samples were taken from the mother, the child, and the

defendant by a phlebotomist, the date they were taken, that the phlebotomist identified each sample with the photograph of each party and the fingerprints of each party, initialed each vial in which the samples were placed, sealed, by identification, and transmitted them to the witness Harmon, and that the chain of custody was documented on a form of the laboratory, that the blood samples were received by the witness into the laboratory, checked for sign of tampering, and that there was no sign of tampering, and the witness identified the defendant and the mother of the child as two persons shown in the photographs. (Transcript, pages R-41 - R-53) The mother testified that the samples were taken by the laboratory-employed phlebotomist identified by the witness Harmon, that the samples were signed, photographs of each party were taken, and the thumb prints were taken, and the defendant himself acknowledged that his blood sample was taken by the phlebotomist

on the same date, that his photograph was the one attached to the sample, and that his signature appeared under the thumb print. The court is of the opinion that the objection of defendant to the chain of custody goes to the weight of the evidence and not to its admissibility. The other grounds of the defendant's Rule 59 motion have been

examined are equally without merit.

ACCORDINGLY, IT IS ORDERED AND ADJUDGED:

1. That the Rule 59 motion of the defendant for new trial, or, in the alternative, for a judgment not withstanding the verdict, or to alter, amend or vacate the judgment, is denied.

ORDERED this the 6th day of January, 1992.

/s/
Robert L. Hodges, Circuit Judge

William Tally, Assistant District Attorney
John Porter, III, Attorney

FILED IN OFFICE
THIS DATE

92 JAN 06 PM 2 08

LEONARD V. GRIGGS
CIRCUIT COURT CLERK

JUN 05 1992

NOTICE: This opinion is subject to formal revision before publication in the advance sheets of Southern Reporter. Readers are requested to notify the Reporter of Decisions. Alabama Appellate Courts, 445 Dexter Avenue, Montgomery, Alabama 36130 (205) 242-4621) of any typographical or other errors in order that corrections may be made before the opinion is printed in Southern Reporter.

STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE COURT OF CIVIL APPEALS

OCTOBER TERM 1991-92

2910210

J.E.B.

v.

State of Alabama ex rel T.B.

Appeal from Jackson Circuit Court

(CV-91-314)

WRIGHT, Retired Appellate Judge

The State of Alabama, on behalf of T.B. (mother), filed a complaint for paternity

and child support against J.E.B. (father) in the District Court of Jackson County. After a hearing the district court entered an order adjudicating paternity and ordered the father to pay child support. The father filed notice of appeal to the circuit court. A jury trial was held.

The jury returned a verdict in favor of the mother. The trial court entered an order accordingly. The father appeals.

Initially the father asserts that the trial court erred in overruling the father's objection to the State's peremptory jury strikes based on his allegation that the State's strikes were based entirely on gender.

The father insists that the State improperly used its peremptory strikes to purposefully eliminate men from the jury. He suggests that such actions were in violation of his rights to equal protection and due process. He requests that this court extend the Batson v. Kentucky, 476 U.S. 79 (1986), principle, which prohibits peremptory strikes based solely upon race, to include gender-based strikes.

This issue has previously been addressed by the court of criminal appeals and the supreme court. Fisher v. State, 587

So. 2d 1027 (Ala. Crim. App.), cert. denied 587 So. 2d 1039 (Ala. 1991); Daniels v. State, 581 So. 2d 536 (Ala. Crim. App. 1990), cert. denied 581 So. 2d 541 (Ala. 1991); Dysart v. State, 581 So. 2d 541 (Ala. Crim. App. 1990), cert. denied 581 So. 2d 545 (Ala. 1991). The supreme court recently revisited the issue in Ex parte Murphy, [Ms. March 20, 1992]

____ So. 2d ____ (Ala. 1992), and declined to extend the Batson principle to gender-based strikes. We must follow the decisions of the supreme court. § 12-3-16, Code 1975.

The father next contends that the blood test results should have been excluded because the State failed to establish a proper chain of custody. He specifically asserts that the phlebotomist's failure to testify was fatal to the admissibility of the blood test results.

Dr. Leigh Ann Harmon, the supervisor of the University of Alabama at Birmingham Immunogenetics/DNA Diagnostic Laboratory, testified that along with the blood samples she received an Immunogenetics/DNA Diagnostic Laboratory Paternity Chain of Custody Document. The document was developed in order to allow the supervisor to confirm the chain of custody without having to bring numerous laboratory personnel to court. Dr. Harman thoroughly

discussed the document and its safety devices. She testified in detail as to her laboratory's procedures for drawing blood samples and assuring proper identification of both the individuals having the test and the blood samples drawn from those individuals. She testified that once the blood samples

were received by the laboratory they were checked for any sign of tampering. She stated that there was no sign of tampering, that the box was taped, the tape was intact, and the tape was initialed by the person who sealed and delivered it.

We find that a proper chain of custody was sufficiently established by Dr. Harman's testimony. Lyle v. Eddy, 481 So. 2d 395 (Ala. Civ. App. 1985).

The father asserts that the trial court erred in allowing into evidence the results of the DNA test without first establishing that the test "met the requirements of the recent supreme court holding in the case of Ex parte Perry, 586 So. 2d 242 (Ala. 1991)."

Ex parte Perry pertains to the admissibility of DNA test results in a forensic setting. That case clearly distinguishes between forensic testing and clinical testing (which we have in this case). The strict admissibility

requirements of Ex parte Perry are not applicable in a paternity action.

The judgment of the trial court is affirmed.

The foregoing opinion was prepared by Retired Appellate Judge L. Charles Wright while serving on active duty status as a judge of this court under the

2910210

provisions of § 12-18-10(e), Code 1975, and this opinion is hereby adopted as that of the court.

AFFIRMED.

All the judges concur.

John H. Wilkerson, Jr. Clerk, Court of Civil Appeals of Alabama do hereby certify that the foregoing is a full and correct copy of the instrument(s) herewith set out as the same appears of record in said court. Witness my hand this 5th day of June, 1992.

/s/ John H. Wilkerson, Jr.

Clerk, Court of Civil Appeals of Alabama

OFFICE OF

CLERK OF THE COURT OF CIVIL APPEALS

STATE OF ALABAMA

MONTGOMERY

CV 91-314

Re: CIV. 2910210 July 17, 1992

J.E.B. vs. STATE OF ALABAMA, ex rel T.B.

Appellant Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Court of Civil Appeals:

___ Court reporter granted additional time to file reporter's transcript to and including

___ Clerk/Register granted additional time to file clerk's record/record on appeal to and including

___ Appell____ granted 7 additional days to file brief(s) to and including

___ Appellant(s) granted 7 additional days to file reply brief(s) to and including

___ Record on Appeal filed on this date.

___ Appendix Filed on this date.

___ Submitted on Briefs

XXX Application for rehearing overruled. No opinion written on rehearing.

___ Permission to file amicus curiae briefs granted.

___ Rules suspended

___ Transferred to the Supreme Court for lack of jurisdiction. A/N

/s/ John H. Wilkerson, Jr.

Clerk, Court of Civil Appeals of Alabama

MAILING ADDRESS:

2600 East South Boulevard, Room 250

Montgomery, Alabama 36116

THE STATE OF ALABAMA -- JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

October 23, 1992

1911717

Ex parte J.E.B.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS

(Re: J.E.B. v. State of Alabama, ex rel. T.B.)

(CIV 2910210 (Jackson CV-91-314))

CERTIFICATE OF JUDGMENT

Writ Denied

==========

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

KENNEDY, J. - Hornsby, CJ., Maddox, Shores and Houston, JJ., concur.

Robert G. Esdale, Clerk, Supreme Court of Alabama do hereby certify that the foregoing is a full, true

and correct copy of the instrument(s) herewith set out as same appears of record in said court. Witness my hand this 23 day of Oct. 1992.

/s/ Robert G. Esdale

Clerk, Supreme Court of Alabama

Supreme Court, U.S.
FILED
APR 14 1993

No. 92-1239

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

J. E. B.,
Petitioner,

v.

T. B.,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. HAS PETITIONER PRESENTED ANY REASON UNDER RULE 10 TO JUSTIFY THIS COURT'S GRANTING CERTIORARI?

2. HAS PETITIONER SHOWN THAT MALES ARE A "COGNIZABLE GROUP" TO WHOM THE PRINCIPLES OF *BATSON V. KENTUCKY* SHOULD APPLY?

PARTIES TO THE PROCEEDING

Petitioner: *James E. Bowman, Sr.*

Respondent: *State of Alabama ex rel. Teresia Bible*

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

J. E. B.,
Petitioner,

v.

T. B.,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

CITATIONS OF OPINIONS AND JUDGMENTS BELOW

The opinion of the Court of Civil Appeals and the denial of certiorari by the Alabama Supreme Court are cited as *J. E. B. v. State of Alabama ex rel. T. B.*, 606 So.2d 156 (Ala.Civ.App. 1992).

JURISDICTION

The Petitioner has invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3). The Respondent notes that 28 U.S.C. § 1257 was amended in 1988, and no longer contains a

paragraph (3). This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). The opinion of the Court of Civil Appeals was issued on June 5, 1992. Rehearing was denied on July 17, 1992, and the Alabama Supreme Court denied the Writ of Certiorari on October 23, 1992. Petitioner filed his Petition for a Writ of Certiorari on January 21, 1993, seeking a writ of certiorari to the Alabama Supreme Court, apparently to require that court to grant certiorari to the Alabama Court of Civil Appeals.

CONSTITUTIONAL PROVISION

Petitioner claims that his right to equal protection of the laws provided by the Fourteenth Amendment to the United States Constitution have been violated.

STATEMENT OF THE CASE

i. Course of Proceedings and Dispositions in the Court Below

This action originated on October 20, 1989, when the State of Alabama ex rel. Teresia Bible filed a paternity action in the District Court of Jackson County, Alabama. The Complaint for Paternity and Child Support alleged that James Edward Bowman, Sr. is the father of Phillip Rhett Bowman Bible, born May 16, 1989. The result of a blood test requested by the Defendant showed a cumulative probability of paternity of 99.92% and a cumulative paternity index of 1,324 to 1. Following

a hearing the district court issued an order on October 22, 1990, establishing paternity and setting an amount of child support.

Following post-judgment proceedings the Defendant filed a notice of appeal to the circuit court for a trial de novo and a jury trial. The Defendant also filed a motion to add one Ricky Stone as a third party defendant to the cause. After a blood test, the result of which indicated that it was genetically impossible for Ricky Stone to be the father of the child, the trial court denied the defendant's motion to add him as a party.

Following the trial, which was held on October 21 and 22, 1991, a jury verdict was returned in favor of the Plaintiff. Based on that verdict the trial court entered an adjudication of paternity on October 23, 1991. A copy of that order is attached as Appendix A. Following a separate hearing before the court, a final order fixing an amount of child support was entered on November 8, 1991. A copy of that order is attached as Appendix B.

On appeal to the Alabama Court of Civil Appeals, that court issued an opinion on June 5, 1992, affirming the judgment of the trial court. A copy of the Opinion of the Court of Civil Appeals is attached as Appendix C.

The Petitioner's Application for Rehearing was overruled by the Court of Civil Appeals on July 17, 1992. The Petitioner's Petition for Writ of Certiorari to the Court of Civil Appeals was denied

by the Alabama Supreme Court on October 23, 1992.

ii. Statement of the Facts

The venire from which the jury was selected in this case consisted of thirty-six people, of whom twenty-four were female and twelve were male. Two men and one woman were excused for cause by the court, leaving twenty-three women and ten men from whom to choose a jury. The parties struck by turns, and the State used its fourth strike to remove a woman from the jury, but used its other nine strikes to eliminate men. The Petitioner used his first ten strikes to eliminate women from the jury, and used his eleventh strike to eliminate the one remaining male. The jury form, showing the strikes, was entered into evidence by the Petitioner.

Following the striking of the jury, the Petitioner challenged the State's strikes based on *Batson v. Kentucky*, which he stated that he understood was applicable to gender-based strikes as well as to strikes based upon race. (R. 35-36.) He also stated that the venire was made up of approximately 75% women. (R. 36.) The trial court stated that there had originally been sixty-two persons in the venire and that the court had instructed the clerk to take every other name until the venire was down to thirty-six. The court then overruled the Defendant's challenge of the State's jury strikes. (R. 37.)

It was uncontested at trial that the Petitioner and Ms. Bible began an intimate relationship in February 1988. (R. 44-45, 153-154.) Ms. Bible stated that this relationship was continuous through August 14, 1988. (R. 47.) Mr. Bowman maintained that he was not intimate with Ms. Bible during June and July of 1988, although he had lunch with her and talked to her on the telephone during those months. (R. 157.) However, he acknowledged that he stayed in a motel with her continuously from August 9 through August 14, 1988 and had intimate relations with her during that time. (R. 159-162.) He also acknowledged taking Ms. Bible to the doctor after she informed him that she thought she was pregnant. (R. 163.)

The laboratory supervisor of the University of Alabama at Birmingham Immunogenetics/DNA Diagnostic Laboratory, Dr. Leigh Ann Harman, testified extensively with regard to the blood tissue testing which her laboratory conducted on Ms. Bible, Mr. Bowman, and the child. (R. 85-145.) During that testimony Dr. Harman stated that the cumulative probability of paternity in the present case is 99.92% that Mr. Bowman is the father of the subject child, based upon a fifty-fifty chance that the parties actually had intercourse. If the likelihood of sexual intercourse were increased, it could raise the probability of paternity as much as one percentage point higher. However, it could not go higher than around 99.99%. She also stated that the cumulative paternity index in this case was 1,324 to 1. (R. 125-126.)

Following the trial the jury returned the following verdict:

> We, the jury, find the issue in favor of the State. We find that Defendant James E. Bowman, Sr. is the father of the child, Phillip Rhett Bowman Bible.
>
> /s/Teresa L. Forrest
> Foreperson

After the entry of judgment, the Petitioner filed a post-judgment motion in which he claimed, among other things, that the State's elimination of men from the jury violated his "right to equal protection of the law as guaranteed by the Fifth Amendment of the United States Constitution." The trial court, relying upon the Opinion of the Alabama Court of Criminal Appeals in *Murphy v. State*, 596 So.2d 42 (Ala.Cr.App. 1991), as to that issue, denied the post-judgment motion. The Alabama Court of Civil Appeals, citing the Alabama Supreme Court's denial of certiorari in *Ex parte Murphy*, 596 So.2d 45 (Ala. 1992), affirmed the trial court's judgment. The Alabama Supreme Court denied certiorari in the present case on October 23, 1992.

SUMMARY OF ARGUMENT

Petitioner has not presented any reasons under Rule 10 to justify the granting of the writ. Petitioner has not shown that males are a "cognizable group" entitled to protection under *Batson v. Kentucky*.

ARGUMENT

I. PETITIONER HAS NOT PRESENTED ANY REASON UNDER SUPREME COURT RULE 10 TO JUSTIFY THE GRANTING OF A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA.

Supreme Court Rule 10.1 provides as follows:

> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such

a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

The Petitioner claims as his only ground under the rule that the holding in this case, which was reached by the Alabama Court of Civil Appeals, conflicts with the 9th Circuit Court of Appeals decision in *U.S. v. De Gross*, 913 F.2d 1417 (9th Cir. 1990).[1] However, he does not show any special or important reason why this Court should grant certiorari in the present case to resolve that alleged

[1] The Supreme Court of Alabama, Alabama's court of last resort, has not addressed the federal question raised here, but has simply declined to address it, denying certiorari in each case.

conflict, or to require the Alabama Supreme Court to do so. The granting or denial of certiorari to the Alabama Court of Civil Appeals is discretionary with the Alabama Supreme Court. See Rule 39, Alabama Rules of Appellate Procedure. The petitioner is not entitled, under this Court's Rule 10.1, to seek certiorari to require the Alabama Supreme Court to reverse its decision denying certiorari.

Petitioner cites a series of cases in which the Alabama Court of Criminal Appeals has declined to extend *Batson* principles to gender-based strikes. See *Murphy v. State*, 596 So.2d 42 (Ala.Cr.App. 1991), *cert. denied*, *Ex parte Murphy*, 596 So.2d 45 (Ala. 1992); *Fisher v. State*, 587 So.2d 1027 (Ala.Cr.App. 1991), *cert. denied*, 587 So.2d 1039 (Ala. 1991); *Daniels v. State*, 581 So.2d 536 (Ala.Cr.App. 1990), *cert. denied*, 581 So.2d 541 (Ala. 1991); *Dysart v. State*, 581 So.2d 541 (Ala.Cr.App. 1990), *cert. denied*, 581 So.2d 545 (Ala. 1991); *Stariks v. State*, 572 So.2d 1301 (Ala.Cr.App. 1990). He also notes the dissent of Justice Maddox in *Ex parte Murphy, supra*, in which Justice Maddox opined that "when the issue is squarely presented to the United States Supreme Court that Court will expand the *Batson* principle to apply to gender-based strikes in instances where men or women, as a cognizable group, are excluded from jury service solely because of their sex." *Ex parte Murphy*, 596 So.2d at 47 (Maddox, J., dissenting).

In spite of Justice Maddox's opinion, when the issue was squarely presented to this Court by Mr. Murphy's attorneys, this Court denied the petition for writ of certiorari. *Murphy v. Alabama*, 506 U.S. ___ , 121 L.Ed.2d 49, 113 S.Ct. 86 (1992). In that case the male defendant was convicted of sodomy in the first degree and sexual abuse in the second degree, and received consecutive sentences of ten years and life in prison on the two charges. The sole question presented to this Court was whether the equal protection clause of the 14th Amendment prohibits a state prosecutor from peremptorily striking venirepersons strictly on the basis of gender.

This Court also denied certiorari in the *Fisher* case, where the same issue was presented. *Fisher v. Alabama*, ___ U.S. ___ , 117 L.Ed.2d 628, 112 S.Ct. 1486 (1992). Mr. Fisher was convicted of capital murder and was sentenced to life in prison without parole. In that case the District Attorney had acknowledged before the trial court that he had struck certain women from the jury because he did not believe that women are good jurors in a capital case.

Petitioner attempts to suggest that a paternity action is more sensitive to discrimination in the use of peremptory strikes than other actions, implying that although criminal trials and civil litigation are race-neutral and civil litigation is primarily gender-neutral, a paternity action automatically establishes the male as the defendant. This is not true under Alabama's gender-neutral civil

paternity statute. *Code of Alabama 1975*, § 26-17-1 *et seq.* A man presumed to be the father of a child or a man alleging himself to be the father of a child who has no presumed father may bring such an action, making the child's mother the defendant if she wishes to contest the claim. *Code of Alabama 1975*, § 26-17-6; *Pate v. State ex rel. Corkren*, 526 So.2d 30 (Ala.Civ.App. 1988). While such a situation is unusual, just as sexual harassment cases against female defendants are unusual, the *Pate* case is by no means unique in Alabama practice.

The evidence before the jury in this case was overwhelming in support of the jury's verdict. Petitioner was clearly not prejudiced by the makeup of that jury, when the evidence would not have supported any other verdict than the one which the jury returned.

While a paternity case is a very serious matter, placing serious obligations upon the defendant for at least the period of the child's minority, these obligations are the same ones that the parents of children born in wedlock assume, many of them with joy, as an important part of a full, rich life. Clearly the consequences of this jury case do not rise to the seriousness of a guilty verdict in criminal cases such as *Murphy* and *Fisher*. Petitioner has delayed long enough his acceptance of his responsibility for young Phillip's support. He has shown no reason why certiorari should be granted in this case.

II. PETITIONER HAS NOT SHOWN THAT MALES ARE A "COGNIZABLE GROUP" TO WHOM THE PRINCIPLES OF *BATSON V. KENTUCKY* SHOULD APPLY.

The issue which the petitioner attempts to raise is of very recent development. At this point the 9th Circuit Court of Appeals apparently stands alone among the federal circuits in applying *Batson* principles to gender-based strikes. The 4th Circuit Court of Appeals has come down squarely against such application. *U.S. v. Hamilton*, 850 F.2d 1038 (4th Cir. 1988), *cert. denied, Hamilton v. U.S.*, 493 U.S. 1069, 107 L.Ed.2d 1017, 110 S.Ct. 1109 (1990). The 11th Circuit Court of Appeals has ruled that black males, as opposed to blacks generally, are not a cognizable group to which *Batson* principles should be applied. *U.S. v. Dennis*, 804 F.2d 1208 (llth Cir. 1986), *cert. denied, Dennis v. U.S.*, 481 U.S. 1037, 95 L.Ed.2d 814, 107 S.Ct. 1973 (1987). The 7th Circuit Court of Appeals has declined to apply *Batson* principles with regard to black women, noting that *Batson* only "require[s] trial courts to be sensitive to the racially discriminatory use of peremptory challenges." *U.S. v. Nichols*, 937 F.2d 1257, 1262 (7th Cir. 1991), *cert. denied, Nichols v. U.S.*, ___ U.S. ___ , 117 L.Ed.2d 151, 112 S.Ct. 989 (1992).

This Court in *Batson* held that for the defendant to establish a prima facie case of purposeful discrimination in the prosecutor's exercise of peremptory challenges, the defendant must first

show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the Defendant' s race. *Batson v. Kentucky*, 476 U.S. 79, 96, 90 L.Ed.2d 69, 89, 106 S.Ct. 1712 (1986). The 9th Circuit Court of Appeals, in applying *Batson* principles to gender-based strikes, did not address the above-cited requirement of *Batson*, but merely declared that males are a constitutionally cognizable group. *U.S. v. De Gross*, 913 F.2d at 1425.

In holding that black males were not a cognizable racial group for *Batson* purposes, the 11th Circuit panel in *U.S. v. Dennis*, 804 F.2d at 1210, set out the following test:

> The test we apply to determine whether appellants are members of a cognizable racial group under *Batson* is the test applied in *Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498, *cited in Batson*, ___ U.S. at ___, 106 S.Ct. at 1723. Such a group is "one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied." *Castaneda*, 430 U.S. at 494, 97 S.Ct. at 1274. The group of blacks generally clearly qualifies under this definition; appellants have failed to show, however, that black males constitute a distinct, recognizable subclass of individuals who

> have been singled out for different treatment under the laws not simply as blacks, but as black males. It would therefore be inappropriate for us to narrow the "cognizable racial group," for present purposes, to include only black males and exclude black females.

Clearly Petitioner in the present case cannot show under the *Dennis* test that males have been singled out for discrimination under the laws of Alabama as written or as applied. Both Alabama's paternity law and its law governing who may be considered for jury service are gender-neutral.

Since *Batson*, this Court has held that a defendant may challenge a prosecutor's race-based peremptory strike whether or not he is a member of the race being excluded (*Powers v. Ohio*, 499 U.S. ___ , 113 L.Ed.2d 411, 111 S.Ct. 1364 (1991)), and that *Batson* principles apply in civil litigation, as well as criminal prosecution. *Edmonson v. Leesville Concrete Company*, 500 U.S. ___ , 114 L.Ed.2d 660, 111 S.Ct. 2077 (1991). However, this Court has not altered or extended *Batson* to apply where a defendant claims discrimination based on factors other than race.

If peremptory strikes are to remain a part of the jury system in the United States, parties must have the right to exercise those strikes against somebody. There are only two genders available for jury selection. If peremptory challenges may not be

used against persons of one gender, then they must be used against persons of the other gender. *U.S. v. De Gross*, itself, illustrates this problem. In that case the appellate court held that the government could prevent a defendant's peremptory challenge of a male venireperson when he was the last remaining male in the venire, but held that the government could not subsequently strike a woman for the sole purpose of getting a "more representative community of men and women on the jury." *U.S. v. De Gross*, 913 F.2d at 1419. In other words, if the government could not come up with a gender-neutral reason for striking any of the six women remaining on the venire, it appears it must strike the sole remaining male which the defendant was forbidden to strike.

In the present case, there is no assertion by the Petitioner that the venire was not selected on a gender-neutral basis. The Petitioner used ten of his eleven peremptory strikes to eliminate women from the jury, and struck a man with his eleventh strike only when it appeared that unless he did so he could not argue that he had an all female jury. If the venire had been comprised of twenty-three men and ten women, rather than twenty-three women and ten men, it is clear that the case would have gone to trial with an all male jury.

If the parties, not having any gender-neutral reasons for striking any of the venire, may not exercise their peremptory strikes against persons of one gender or the other, then peremptory strikes have no meaning. This is clearly not the intent of

the *Batson* decision, which, while requiring racially neutral reasons for challenging prospective jurors of a particular race, generally reaffirms the use of peremptory challenges in jury selection. Males are not a cognizable group to which *Batson* principles should apply.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED,

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No. 92-1239

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

J. E. B.,
Petitioner,

v.

T. B.,
Respondent.

PROOF OF MAILING AFFIDAVIT

I, Lois N. Brasfield, Attorney of Record for the State of Alabama ex rel. Teresia Bible, Respondent herein, and a Member of the Bar of the Supreme Court of the United States, hereby certify that, on the 14th day of April, 1993, I deposited in a United States mailbox located at the corner of Jackson Street and Monroe Street, Montgomery, Alabama, with first-class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing, the foregoing RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Lois N. Brasfield

SWORN TO AND SUBSCRIBED before me at Montgomery, Alabama, this the 14th day of April, 1993.

NOTARY PUBLIC

MY COMMISSION EXPIRES:

4/18/94

No. 92-1239

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

J. E. B.,
Petitioner,

v.

T. B.,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

APPENDIX

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APPENDIX A

THIRTY-EIGHTH
JUDICIAL CIRCUIT OF ALABAMA
IN THE CIRCUIT COURT OF
JACKSON COUNTY, ALABAMA

STATE OF ALABAMA, ex rel., TERESIA BIBLE,	)	
PLAINTIFF	)	
vs.	)	CIVIL ACTION
	)	NO. CV-90-314
JAMES EDWARD BOWMAN, SR., DEFENDANT	)	

ORDER

Trial of this cause was commenced on October 21, 1991, and a evidence was submitted to a jury duly and lawfully impanelled and consisting of, to wit: Teresa L. Forrest and eleven other good and lawful persons.

On October 22, 1991 after duly deliberating on the evidence, the jury returned the following verdict:

> "WE, THE JURY, FIND THE ISSUE IN FAVOR OF THE STATE. WE FIND THAT DEFENDANT JAMES E. BOWMAN, SR. IS THE FATHER

OF THE CHILD, PHILLIP RHETT BOWMAN BIBLE.

/s/TERESA L. FORREST
FOREPERSON"

ACCORDINGLY, IT IS ORDERED AND ADJUDGED:

1. That the defendant, James E. Bowman, Sr., is determined to be the father of Phillip Rhett Bowman Bible, born May 16, 1989, and judgment is entered accordingly;

2. That, pursuant to Rule 54 (b), there being no just cause for delay, final judgment is expressly entered on the issue of paternity in this cause;

3. That, the issue of the amount of child support obligation of the defendant for the support and maintenance of the minor child is scheduled for hearing before this court on the 6th day of November, 1991 at 1:30 p.m., and the parties are directed, prior to that date, to supplement child support affidavits and child support guidelines previously filed in this cause, in the event any change in that information have occurred, and the parties shall include the amount of monthly health insurance premium the mother is paying currently for health insurance coverage for the child and shall also include the actual amount of monthly child care expenses the mother is incurring for the child and whether such child care expense is in a home or day care center.

ORDERED this the 23rd day of October, 1991.

/s/Robert L. Hodges
Robert L. Hodges,
Circuit Judge

John Porter, III, Attorney
William Tally, Assistant District Attorney

APPENDIX B

THIRTY-EIGHTH
JUDICIAL CIRCUIT OF ALABAMA
IN THE CIRCUIT COURT OF
JACKSON COUNTY, ALABAMA

STATE OF ALABAMA, ex rel., TERESIA BIBLE,	)	
PLAINTIFF	)	
vs.	)	CIVIL ACTION
	)	NO. CV-90-314
JAMES E. BOWMAN, SR., DEFENDANT	)	

FINAL ORDER

Income affidavits having been submitted to the court for each party, the child support obligation of the defendant James E. Bowman, Sr., for the support and maintenance of Phillip Rhett Bible, the child of the parties, is fixed at $415.71 per month, in accordance with the attached child support guideline form, and the defendant is to pay that amount, together with the clerk's administrative costs, to the clerk of this court on the 15th of each month during the minority and dependency of the child, the first payment to be made no later than November 15, 1991.

It is further ORDERED that the defendant be

given credit for all child support payments made since December 6, 1990 pursuant to the amended order of Judge Ralph H. Grider of the District Court of this circuit, and that, in the event the defendant shall not have paid the minimum amount of the child support obligation fixed by this order each month since Judge Grider's order, the defendant forthwith pay that to the clerk of this court.

All child support payments are to be disbursed by the clerk to Teresia Bible, the mother of the child.

Costs are taxed to the defendant.

ORDERED this the 8th day of November, 1991.

/s/Robert L. Hodges
Robert L. Hodges,
Circuit Judge

John Porter, III, Attorney
William Tally, Assistant District Attorney

APPENDIX C

J.E.B.

v.

STATE of Alabama ex rel. T.B.

2910210.

Court of Civil Appeals of Alabama.

June 5, 1992.

Rehearing Denied July 17, 1992.

Certiorari Denied Oct. 23, 1992

Alabama Supreme Court 1911717.

L. CHARLES WRIGHT, Retired Appellate Judge.

The State of Alabama, on behalf of T.B. (mother), filed a complaint for paternity and child support against J.E.B. (father) in the District Court of Jackson County. After a hearing the district court entered an order adjudicating paternity and ordered the father to pay child support. The father filed notice of appeal to the circuit court. A jury trial was held. The jury returned a verdict in favor of the mother. The trial court entered an order accordingly. The father appeals.

Initially the father asserts that the trial court erred in overruling the father's objection to the State's peremptory jury strikes based on his

allegation that the State's strikes were based entirely on gender.

The father insists that the State improperly used its peremptory strikes to purposefully eliminate men from the jury. He suggests that such actions were in violation of his rights to equal protection and due process. He requests that this court extend the *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct.1712, 90 L.Ed.2d 69 (1986), principle, which prohibits peremptory strikes based solely upon race, to include gender-based strikes.

This issue has previously been addressed by the court of criminal appeals and the supreme court. *Fisher v. State*, 587 So.2d 1027 (Ala.Crim.App.), *cert. denied* 587 So.2d 1039 (Ala. 1991); *Daniels v. State*, 581 So.2d 536 (Ala. Crim. App. 1990), *cert. denied* 581 So.2d 541 (Ala. 1991); *Dysart v. State*, 581 So.2d 541 (Ala.Crim.App. 1990), *cert. denied* 581 So.2d 545 (Ala. 1991). The supreme court recently revisited the issue in *Ex parte Murphy*, 596 So.2d 45 (Ala. 1992), and declined to extend the *Batson* principle to gender-based strikes. We must follow the decisions of the supreme court. § 12-3-16, Code 1975.

The father next contends that the blood test results should have been excluded because the State failed to establish a proper chain of custody. He specifically asserts that the phlebotomist's failure to testify was fatal to the admissibility of the blood test results.

Dr. Leigh Ann Harman, the supervisor of the University of Alabama at Birmingham Immunogenetics/DNA Diagnostic Laboratory, testified that along with the blood samples she received an Immunogenetics/DNA Diagnostic Laboratory Paternity Chain of Custody Document. The document was developed in order to allow the supervisor to confirm the chain of custody without having to bring numerous laboratory personnel to court. Dr. Harman thoroughly discussed the document and its safety devices. She testified in detail as to her laboratory's procedures for drawing blood samples and assuring proper identification of both the individuals having the test and the blood samples drawn from those individuals. She testified that once the blood samples were received by the laboratory they were checked for any sign of tampering. She stated that there was no sign of tampering, that the box was taped, the tape was intact, and the tape was initialed by the person who sealed and delivered it.

We find that a proper chain of custody was sufficiently established by Dr. Harman's testimony. *Lyle v. Eddy*, 481 So.2d 395 (Ala. Civ. App. 1985).

The father asserts that the trial court erred in allowing into evidence the results of the DNA test without first establishing that the test "met the requirements of the recent supreme court holding in the case of *Ex parte Perry*, 586 So.2d 242 (Ala. 1991)."

Ex parte Perry pertains to the admissibility of DNA test results in a forensic setting. That case clearly distinguishes between forensic testing and clinical testing (which we have in this case). The strict admissibility requirements of *Ex parte Perry* are not applicable in a paternity action.

The judgment of the trial court is affirmed.

The foregoing opinion was prepared by Retired Appellate Judge L. CHARLES WRIGHT while serving on active duty status as a judge of this court under the provisions of § 12-18-10(e), Code 1975, and this opinion is hereby adopted as that of the court.

AFFIRMED.

All the judges concur.

JUL 15 1993

No. 92-1239

In The

Supreme Court of the United States

October Term, 1992

J.E.B.,

Petitioner,

vs.

T.B.,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of The State Of Alabama

JOINT APPENDIX

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Certiorari Granted May 17, 1993

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01/20/93 PETITION FOR WRIT OF CERTIORARI TO ALABAMA SUPREME COURT FROM UNITED STATES SUPREME COURT FILED

05/17/93 PETITION FOR WRIT OF CERTIORARI TO ALABAMA SUPREME COURT GRANTED BY UNITED STATES SUPREME COURT

TRANSCRIPT OF VOIR DIRE AND JURY SELECTION

[RT-4] THE COURT: Ladies and gentlemen, I need to ask you a few questions touching your qualifications to serve as jurors in this case, and then the attorneys will have an opportunity to ask you some questions. It's very important that you listen carefully to the questions and that you answer fully and fairly so that the parties can get a fair and impartial jury in the case. Basically, this is a paternity case. This is a paternity case brought by the State of Alabama on the relationship of T.B. against Mr. B. – Mr. J.E.B., Sr. The issue for the jury to determine in this case is whether Mr. B. is the father of a child born to Miss B. on or about May 16th, 1989, a male child, P.R.B.

Now, with that brief explanation to you of the nature of this case, I need to ask you a few questions.

The nominal plaintiff in the case is the State, but the action is brought on behalf of the mother of the child, Miss T.B. Would you stand, please, ma'am.

Are any of you related by blood or marriage to Miss B? Thank you.

[RT-5] (No response.)

The Assistant District Attorney representing Miss B. in the State in this case is Mr. William Tally, who is standing now.

Are any of you related by blood or marriage to Mr. Tally who practices law here in Scottsboro?

(No response.)

Are any of you related by blood or marriage to any of the attorneys in the District Attorney's office, Mr. Dwight Duke or Mr. Charlie Rhodes or another part-time Assistant District Attorney, Mr. Tommy Armstrong.

Are any of you related by blood or marriage to any of those lawyers?

(No response.)

The defendant in this case is Mr. J.E.B., Sr. Would you stand, please, sir. Are any of you – he is from ___, ___, I believe. Are any of you related by blood [RT-6] or marriage to Mr. B?

(No response.)

Mr. B. is represented in the case by Mr. John Porter, an attorney from Scottsboro, who is standing now. Are any of you related by blood or marriage to Mr. Porter or to those associated in the practice of law with Mr. Porter in the firm of Livingston, Porter and Paulk, – Mr. Jack Livingston or Mr. Gerald Paulk?

(No response.)

Do any of you have any ongoing business connection, or you [sic] a partner in business, or do you have any ongoing business connection with either of the parties in this case, Miss B. or Mr. B?

(No response.)

Is any one of you a witness in the case so far as you know?

[RT-7] (No response.)

Let me go one step further and ask you this, Ladies and Gentlemen of the jury panel, have you read, heard or seen anything about the case whether it's this morning while you were waiting for the trial of this case, while you were waiting here as jurors in the courthouse, or whether you have leaned across the back fence and talked to a neighbor about it or something you may have heard from whatever source? Has any one of you heard anything about the facts in this case?

(No response.)

And I have one final question and the attorneys will then have some questions, and that is this: Based upon the limited information you have been given about this case, the issue that will be tried before the jury and the identity of parties and the incident out of which it arises, does any one of you, Ladies and Gentlemen on the jury panel, know of any reason why if you are selected as a juror [RT-8] in this case you could not give the plaintiff and the defendant a fair and impartial trial? Any of you know of any reason, whatever that may be, even if it may be private to you and I will not inquire into it. If you are of the notion based upon what's been described to you before you have heard any evidence that you cannot be a fair and impartial juror in this case for any reason, I need you to signify now.

Yes, sir, Mr. Young? You feel you couldn't be fair and impartial?

PROSPECTIVE JUROR YOUNG: Well, I don't believe in judging. It goes against my religious beliefs.

THE COURT: I appreciate that. I need to know if any of you Ladies and Gentlemen are of that notion.

PROSPECTIVE JUROR SEALEY: For the same reason.

THE COURT: You are Mrs. Sealey?

PROSPECTIVE JUROR SEALEY: Yes, sir.

[RT-9] THE COURT: Anyone else?

PROSPECTIVE JUROR SULLIVAN: For the same reason.

THE COURT: Mr. Sullivan, that's a religious conviction?

PROSPECTIVE JUROR SULLIVAN: Yes, sir.

THE COURT: I should say religious belief. When I say conviction, people get the wrong notion.

Anyone else?

(No response.)

VOIR DIRE BY THE STATE

MR. TALLY: Ladies and gentlemen, as the Judge has told you, I am Bill Tally. I represent T.B. who is the plaintiff in this case. In other words, she brought an action for a paternity, and I am sure you know what that involves. It involves getting into some [RT-10] issues that may not be pleasant. Sometimes we have to get into areas perhaps we prefer that we didn't get into. If you serve on this jury, you have to understand that we explore issues and matters that there is no way to avoid getting down to the basic facts as to what happened.

And I first want to know does that make you uncomfortable? Are any of you just a little uneasy sitting in on a case that's going to involve determining who the father of a child is? Does that make you uneasy or maybe a little bashful about having to sit on a case like that? Does that cause any of you any difficulty?

(No response.)

Mr. B. is seated here next to his lawyer. I believe he is from ___, ___ or ___ - ___ area.

Do any of you happen to know him or any of his family?

(No response.)

[RT-11] He is represented by John Porter of the firm of Livingston, Porter and Paulk. Do you any of you know John in any capacity whether it's just nodding to him on the street or whether you may go to church with him or belong to the same club or have you used him as a lawyer? Does anybody in this panel know John?

Mrs. Parks, how do you know him, please, ma'am?

PROSPECTIVE JUROR PARKS: Neighbor and we go to church together.

MR. TALLY: Anyone else that knows Mr. Porter? Have any of you ever used him for a lawyer, had any connection with him?

(No response.)

He has two partners, Gerald Paulk and Jack Livingston. Any of you know Gerald Paulk?

Yes, ma'am, how do you know him, Mrs. Whatley?

[RT-12] PROSPECTIVE JUROR WHATLEY: I have known Gerald for several years before he moved to Scottsboro. Tuscaloosa.

MR. TALLY: You knew him before he lived here then?

PROSPECTIVE JUROR WHATLEY: Yes.

MR. TALLY: Was that just a social?

PROSPECTIVE JUROR WHATLEY: Just social is all.

Mr. TALLY: Anyone else? Have any of you ever used Mr. Paulk for a lawyer maybe just making a deed, something simple?

(No response.)

What about Jack Livingston? Mrs. Whatley, is that the same, you have known Jack, I guess, for a number of years?

PROSPECTIVE JUROR WHATLEY: Yes.

MR. TALLY: Has he done any legal work for you?

[RT-13] PROSPECTIVE JUROR WHATLEY: Wrote my will.

MR. TALLY: Yes, ma'am?

PROSPECTIVE JUROR WOMACK: He drew up my husband's and my will. He has made a couple of deeds for us.

MR. TALLY: The fact that his partner is now representing Mr. B. in court, would that have any effect on

your judgment as to who is right and who is wrong in this case?

PROSPECTIVE JUROR WOMACK: I don't think so.

MR. TALLY: And you, Mrs. Whatley, the same? Who else do we have back there; how about you, ma'am?

PROSPECTIVE JUROR SEALEY: We have used him as a lawyer.

MR. TALLY: Start on the back. Yes, ma'am?

PROSPECTIVE JUROR GALLOWAY: He handled a divorce for me a few years ago.

[RT-14] MR. TALLY: Who else?

PROSPECTIVE JUROR CLAY: I used to work for Mr. Livingston.

MR. TALLY: Used to work for him?

PROSPECTIVE JUROR CLAY: Yes.

MR. TALLY: Mrs. Galloway, would his representation of you in the past have any bearing on your ability to be impartial in this case and Mrs. Clay? It wouldn't affect you at all? Thank you.

Anybody else then that knows Mr. Livingston or has used him for a lawyer?

(No response.)

As I stated at the outset, anytime you are involved in a paternity case, you do have to delve into issues which may be somewhat unpleasant at times, and I have to do the same thing here. Neither I or Mr. Porter want to

embarrass anyone or put anyone in an uncomfortable position- but there are certain things [RT-15] we have to know to choose the jury. We want the fairest, most impartial group we can possibly have and everyone due to their background, due to their raising, circumstances in the past is going to have a certain outlook on life; that's only human. That's the reason we are asking you these questions.

And I have to ask you if anyone in this group has had either themselves or a relative or family member involved in a similar situation where that person has been accused of being the father of a child where the child was born out of wedlock or there was a dispute about who the father was? Do you have anybody in your family or yourself has that ever happened to you?

PROSPECTIVE JUROR ROGERS: My sister.

MR. TALLY: If any of you would rather come down and talk about this privately, do you mind telling me a little more about it?

PROSPECTIVE JUROR ROGERS: Well, my sister, younger than me, she got pregnant by one of the [RT-16] county's officers. They had kind of a little dispute over that.

MR. TALLY: So that was your sister then, and it was another man who was involved?

PROSPECTIVE JUROR ROGERS: Yes.

MR. TALLY: Anyone else? This could be a relative, family member, even a close friend, somebody this has happened to that you know of; in other words, you are aware of this situation.

Yes, ma'am?

PROSPECTIVE JUROR CARTER: I did but they didn't have a court over it, you know, my niece had a baby out of wedlock, but nothing was ever done, you know.

MR. TALLY: Nothing was ever pursued on it?

PROSPECTIVE JUROR CARTER: No.

MR. TALLY: I appreciate y'all's answers.

Anyone else?

(No response.)

[RT-17] Do any of you because of some experience in the past or some belief that you have, any of you have doubts about whether a man should be pursued as the father of a child born out of wedlock? Does that make you feel uncomfortable? In other words, that if a woman bears a child out of wedlock, she pursues a man that's alleged to be responsible? Do you have any difficulty with that at all? If you do, just speak up. This is no time to be bashful.

(No response.)

I guess just one final question would be if each of you feel that you can make a promise that if you are selected to serve on this case, that you will follow the Judge's instructions and enter a verdict according with the Judge's instructions and the provisions of the law. Can each of you do that, promise to abide by the Judge's directions; in other words, make your decision based on the facts?

That's all I have. Thank you very much.

[RT-18] THE COURT: Let me ask one question before you start. Mrs. Rogers and Mrs. Carter, we appreciate your answering the question. I understand it is essentially one I need to ask you one thing further. In view of that fact in your family, each of you, would that interfere in any way with your ability to sit impartially as a juror in this case?

PROSPECTIVE JUROR ROGERS: I don't think so.

PROSPECTIVE JUROR CARTER: I will be honest. I am not sure.

THE COURT: Thank you, ma'am.

MR. PORTER: Mrs. Carter, I appreciate your response that you are not sure because that kind of honesty is important to us today as Mr. Tally and I ask you these questions. We want you to be honest with us. We don't want you to hold anything back and think well maybe that applies to me and maybe it doesn't. The questions that I ask and those that Bill asked if in a few minutes you recall that maybe you should have [RT-19] responded to one of his questions and you just remembered it, go ahead and respond. I am sure that he would appreciate it and so would I. That's what we want is honest, straight-forward answers to some maybe delicate questions about family matters, and that is what we are here about today is family matters.

As the Judge told you, I am here today with Mr. J.B. and his wife of 20 years, F.B., and he is accused of being the father of Miss B.'s child. That's what we are here about, and that is a delicate question because it involves some delicate issues, and there may be some matters of

that type that are discussed during the trial of this case. I don't expect it to be anything more than you hear on – certainly not anymore than you hear on the daytime soap operas should you watch those or the evening news even. But for us here in Scottsboro and for this panel, it may be something that you are not used to discussing. So if some of these matters are a little delicate and you would rather not discuss them, that's fine if you rather not listen to them. You can turn off your T.V. if you don't like the soap operas or you can [RT-20] turn off the T.V. if you don't like the news. We don't want to put you in a situation you feel uncomfortable sitting through at trial where these kind of matters are discussed. That's the reason we ask these questions because we don't want to, as Mr. Tally said, we don't want to embarrass you by any means. We just want to be able to ask you some questions that reflect on your background and get to know you in these few minutes we have got, get to know you a little bit better so we can get a jury that sits in this box down here – 12 jurors that have absolutely no feelings one way or another about this case when we start so that you can take the evidence that comes to you and apply that evidence to what the Judge says and come up with a verdict in the case.

So that's what we are doing in these few minutes is trying to get to know you a little bit better.

In trying to get to know you a little better, let me ask you if anybody knows T.B? I believe she is from ___. She works in ___, Mr. Casey, [RT-21] is that right?

PROSPECTIVE JUROR CASEY: Yes

MR. PORTER: How do you know her, friendly?

PROSPECTIVE JUROR CASEY: Went to school.

MR. PORTER: Went to school with her?

PROSPECTIVE JUROR CASEY: Yes.

MR. PORTER: Anyone else know Miss B?

Mr. Casey, the fact that you know her, would you tend to believe what she says as opposed to someone else possibly?

PROSPECTIVE JUROR CASEY: No, sir.

MR. PORTER: Give her side more weight than another side?

PROSPECTIVE JUROR CASEY: No, sir.

MR. PORTER: Have you kept up with her in the years since you went to school?

[RT-22] PROSPECTIVE JUROR CASEY: No, sir.

MR. PORTER: Do you see her any now? She lives in ___ and so do you?

PROSPECTIVE JUROR CASEY: Very seldom.

MR. PORTER: Let me ask this about her family. I believe her father's name is A., call him A. He works at T.V.A.; mother works at Andover Togs. I don't know what her name is. It's something B. Anybody know them, A.B. or his wife?

Mr. Cooper, how do you know them?

PROSPECTIVE JUROR COOPER: I used to work with him when he worked at T.V.A.

MR. PORTER: How long ago has that been?

PROSPECTIVE JUROR COOPER: Two years ago.

MR. PORTER: Did you ever hear him discuss this situation, the fact that Miss B. – Miss T.B. – had a baby?

[RT-23] PROSPECTIVE JUROR COOPER: We worked on the same project. We didn't work side by side. I just knew his name.

MR. PORTER: Would you consider yourself a friend of his or just co-employee?

PROSPECTIVE JUROR COOPER: Just a co-employee.

MR. PORTER: Anybody else? All right, sir. Mr. Bishop, did you work with Mr. B?

PROSPECTIVE JUROR BISHOP: Yes, sir.

MR. PORTER: Did you work closely with him or are you just co-employees?

PROSPECTIVE JUROR BISHOP: We were co-employees.

MR. PORTER: You ever hear him discuss the situation with his daughter and things of that nature?

PROSPECTIVE JUROR BISHOP: No.

MR. PORTER: Anyone else; did I see anymore?

(No response.)

[RT-24] Let me just ask Mr. Cooper and Mr. Bishop, the fact that you knew or know Mr. A.B. or A.B., would that tend to influence you one way or the other in this case?

Thank you.

There is a fellow that may testify in this case and his name will come up certainly during the case. I believe his name is Ricky Stone. Does anybody know Ricky Stone? He lives also in ___. Does anybody know him?

(No response.)

Mr. Tally asked the question one way and got a couple of answers the other way. His question was: Has anybody ever been sued for paternity or been involved, and someone tried to claim that either you or a family member was the father and we got two responses on the other side. That is, that somebody in your family or somebody that you knew closely had a child and sought paternity. That's my question straightforward. Has anybody in your family – by your family, I mean your mother, father, sister, brother, your children, close [RT-25] aunts and uncles, cousin, things like that, people you consider to be close family members – have they ever been involved in a paternity matter where they have had a child and attempted to establish the paternity of someone? We got two answers already, Mrs. Carter and Mrs. Rogers. That's the kind of answers that we are looking for – that I am looking for. So those are still the only two responses?

Any of you by nature either of your current employment, your past employment, or your education and training of any kind have any expertise in doing lab work where you sit around and you look – in this case maybe blood samples – or any kind of lab work where you try to figure out what's in something, chemistry or biology, something like that so that you consider yourself to have a little bit more training than, I suppose, an average

person, if you understand my question. Anybody ever have any kind of particular training in doing lab work, ever been involved in that field where you did testing for possibly the environmental work or chemistry work, things like that you did that on a regular basis?

(No response.)

[RT-26] Let me explain in this case that there may be someone to come testify to you about trying to match some blood samples and trying to find who the father of this child is, and there may be some testimony about how you go about that, take blood samples from one person and another person and you match it all up and you up it to some numbers and statistics and bingo, you come out with a number. So really my question is: If that testimony is presented to you, would it be kind of testimony – kind of things that you are used to, kind of things you hear about whether it's blood testing or any other kind of testing on a regular basis so that you would know a little bit more about it than I do certainly as a non-chemist, non-lab person?

(No response.)

Along the same line as my questions about paternity matters, have any of you ever been involved in a situation where either the State of Alabama through Mr. Tally or one of the other Assistant District Attorneys or [RT-27] any other state has attempted to collect child support for you – back child support – been involved in that kind of issue?

Several. Okay. Mrs. Clay, Mrs. Galloway.

PROSPECTIVE JUROR GALLOWAY: I am going through it right now.

MR. PORTER: Are you going through Mr. Tally's office?

PROSPECTIVE JUROR GALLOWAY: No; through Dwight Duke.

PROSPECTIVE JUROR CLAY: It was years ago. My husband had to pay child support, and he left the state.

MR. PORTER: Anybody else now?

PROSPECTIVE JUROR JOHNSON: Would you repeat the question?

MR. PORTER: I will do my best. It was a long one. Has anyone ever been in the situation where they have either had the State of Alabama or another official from another state, whatever state it might have been, [RT-28] such as in the same position as Mr. Tally, the Assistant District Attorney, or a private attorney attempt to collect back child support for you; is that a little clearer: Probably not. Anybody else that applies to?

(No response.)

Now, how about from you, anybody been in the situation where someone has attempted to collect child support from you instead of for you? Let me say – let me expand this. I probably didn't make it clear. This is to your immediate family, too, just not particularly you. I would like to know if any of your close family members have been involved in this situation.

Mrs. Johnson, I got a response. Which way does it go?

PROSPECTIVE JUROR JOHNSON: My husband has to pay child support. I also collect it.

MR. PORTER: You also collect it?

PROSPECTIVE JUROR JOHNSON: Yes.

[RT-29] MR. PORTER: Anyone else?

PROSPECTIVE JUROR BROOKS: I had to pay child support.

MR. PORTER: Mr. Brooks.

PROSPECTIVE JUROR ROGERS: My sister is trying to get hers.

MR. PORTER: Same situation?

PROSPECTIVE JUROR ROGERS: Yes.

MR. PORTER: Anyone else?

PROSPECTIVE JUROR HAYNES: My daughter is getting it, but it's voluntarily.

MR. PORTER: It's voluntarily. Thank you, Mrs. Haynes.

Anyone else now?

(No response.)

Do any of you know Bill Tally, the Assistant D.A. in this case, know him – same [RT-30] question he asked about me – know him personally, socially, ever been to him for a lawyer, anything like that?

Mrs. Baker?

PROSPECTIVE JUROR BAKER: He was the attorney for my sister in a divorce action.

MR. PORTER: All right. Anybody else?

Mrs. Parks?

PROSPECTIVE JUROR PARKS: He just lives down the street, and I just know him.

MR. PORTER: Anybody else?

Mrs. Whatley, Mrs. Wilhelm. Anybody else?

PROSPECTIVE JUROR WILHELM: I worked for the other part-time Assistant D.A.

MR. PORTER: You do now or you did?

PROSPECTIVE JUROR WILHELM: I used to.

[RT-31] MR. PORTER: You used to work for Tommy?

PROSPECTIVE JUROR WILHELM: Yes.

MR. PORTER: Anybody else?

Anybody ever had him do any kind of legal work for you that hasn't already responded either as a private attorney? He is involved in private practice here and also does child support work with the District Attorney's office.

(No response.)

Mrs. Galloway, you may not have met him yet, but if you have a child support matter, you probably will. Anybody else then?

(No response.)

The two ladies employed in his office that handle processing that kind of matters, their names are Jo Ann Holland and Carolyn Jeffrey. Anybody know them?

[RT-32] Mrs. Wilhelm, Mrs. Parks, Mrs. Whatley, I imagine you do. Anybody else?

(No response.)

Those that responded that they know either Mr. Tally or those ladies that work in the child support office, the fact that you know them, would that tend to influence you one way or the other in this case either positively or negatively either way?

(No response.)

Having heard all what I have said and what Mr. Tally said and what the Judge has said, is there anybody that would rather not sit on this case that hasn't already responded for whatever reason, and I am not going to ask the reason. You just rather not sit here and listen to this case or you feel right now one way or the other so that it would influence you so you couldn't render a fair verdict; anybody feel that way, and I am not going to ask you why. Okay. Thank you. Appreciate your [RT-33] answers. Thank you very much.

(Side-bar conference, outside jury's hearing.)

THE COURT: Any challenges by the state?

MR. TALLY: 22 and 24, two individuals indicated they would not serve due to religious convictions.

THE COURT: Actually, there are three.

MR. TALLY: I only object to two.

THE COURT: I will grant 22. I will grant 24. Any others?

MR. TALLY: I recall the third one – did you mention that one, John?

MR. PORTER: 37.

MR. TALLY: 37 was the third religious. If it's my turn, I object to that.

[RT-34] THE COURT: I will take 37 off. Any others from the state?

MR. TALLY: That's all.

THE COURT: How about you?

MR. PORTER: I don't think so, Judge. Mrs. Carter said she wasn't sure.

THE COURT: I think I ought to ask her a further question.

(Jury's hearing:)

THE COURT: Mrs. Carter, after hearing these lawyer's questions, have you changed your mind in any way; you feel like you are not sure whether you could be impartial?

PROSPECTIVE JUROR CARTER: I probably could.

THE COURT: Probably could be impartial. Let me turn that around and ask you if there is any question in your mind about it?

[RT-35] PROSPECTIVE JUROR CARTER: No.

(Outside jury's hearing:)

THE COURT: You challenge her?

MR. PORTER: I challenge her.

THE COURT: I deny the challenge.

Any reason to impanel an alternate juror?

MR. TALLY: I don't think so.

THE COURT: No.

(Jury struck.)

(Side-bar conference, outside jury's hearing.)

MR. PORTER: Judge, before the jury is impaneled, I propose to the court that I do not know the appropriate method to do this, we would challenge the state's strikes on the *Batson* decision and other decisions that have followed that I have heard and understand that gender [RT-36] based strikes based upon gender are just as [in]valid on race strikes based on the race – the state's strikes with the exception of one were males. Virtually none of them answered any questions whatsoever which would show prejudice or bias in any way, and I submit to the court that they were basically struck solely upon gender.

THE COURT: You are talking about gender strikes?

MR. PORTER: Yes, sir. Gender strikes. Again, I propose to the court I don't know exactly how to do this. I have never done it especially on gender.

THE COURT: You are not raising a race question? I am going to deny your motion – your challenges – on the jury that's been impaneled on the basis of gender strikes.

MR. PORTER: We would also point out to the court the venire is made up of approximately 75 percent women, which also adds to the fact that he has struck all but one of the men.

[RT-37] THE COURT: For the record, I will relate that there were 62 jurors on this morning's voir dire, and I did not need all 62 so I instructed the clerk to take every other name until we got 36. That's the way these people wound up where they are. I overrule your objection and deny your motion.

(A jury was sworn and impaneled.)

(Jury present.)

[CR36]

THIRTY-EIGHTH JUDICIAL CIRCUIT OF ALABAMA
IN THE CIRCUIT COURT OF
JACKSON COUNTY, ALABAMA

STATE OF ALABAMA, ex rel., TERESIA BIBLE, PLAINTIFF	)	CIVIL ACTION NO.: 90-314
VS.	)	
JAMES EDWARD BOWMAN, SR., DEFENDANT	)	

ORDER

Trial of this cause was commenced on October 21, 1991, and a evidence was submitted to a jury duly and lawfully impanelled and consisting of, to wit: Teresa L. Forrest and eleven other good and lawful persons.

On October 22, 1991 after duly deliberating on the evidence, the jury returned the following verdict:

> "WE, THE JURY, FIND THE ISSUE IN FAVOR OF THE STATE. WE FIND THAT DEFENDANT JAMES E. BOWMAN, SR. IS THE FATHER OF THE CHILD, PHILLIP RHETT BOWMAN BIBLE.
>
> /S/ TERESA L. FOREST
> FOREPERSON"

ACCORDINGLY, IT IS ORDERED AND ADJUDGED:

1. That the defendant, James E. Bowman, Sr., is determined to be the father of Phillip Rhett Bowman Bible, born May 16, 1989, and judgment is entered accordingly;

2. That, pursuant to Rule 54 (b), there being no just cause for delay, final judgment is expressly entered on the issue of paternity in this cause;

3. That, the issue of the amount of child support obligation of the defendant for the support and maintenance of the minor child is scheduled for hearing before this court on the 6th day of November, 1991 at 1:30 p.m., and the parties are directed, prior to that date, to supplement child support affidavits and child support guidelines previously filed in this cause, in the event any changes in that information have occurred, and the parties shall include the amount of monthly health insurance premium the mother is paying currently for health insurance coverage for the [CR37] child and shall also include the actual amount of monthly child care expenses the mother is incurring for the child and whether such child care expense is in a home or day care center.

ORDERED this the 23rd day of October, 1991.

/S/ Robert L. Hodges
Robert L. Hodges,
Circuit Judge

John Porter, III, Attorney
William Tally, Assistant District Attorney

[CR44]

STATE OF ALABAMA, ex rel., TERESA BIBLE	)	IN THE CIRCUIT COURT FOR JACKSON COUNTY, ALABAMA
PLAINTIFF	)	
VS.	)	CASE NO: CV-90-314
JAMES EDWARD BOWMAN	)	
DEFENDANT	)	

POST-JUDGMENT MOTION

NOW COMES the defendant herein and pursuant to Rule 50 of the Alabama Rules of Civil Procedure, does hereby move this Court for entry of an Order of Judgment Notwithstanding the Verdict or in the alternative, pursuant to Rule 59 of the Alabama Rules of Civil Procedure, does hereby move this Court for a new trial or in the alternative to alter, amend or vacate the Judgment entered by this Court on the 23rd day of October, 1991 and the Order of Support dated November 8, 1991 and in support thereof does hereby say as follows:

1. The verdict of the jury and judgment entered thereon is against the great weight of the evidence.

2. The verdict of the jury and the judgment entered thereon is contrary to Alabama law and the facts presented to the Court.

3. The Court erred in denying the defendant's objection to the State's unconstitutional, gender based peremptory jury challenges.

4. The verdict of the jury and the judgment entered thereon is void in that the defendant's fifth amendment right to equal protection of the law was violated by the State's exercising its peremptory jury challenges based solely upon gender.

5. The jury as impaneled containing all females, violated the [CR45] defendant's right to equal protection of the law as guaranteed by the Fifth Amendment of the United States Constitution.

6. The State's use of peremptory jury challenges, eliminating all males from the jury, violated the defendant's Fifth Amendment right to equal protection of the laws.

7. After the defendant's objection to the State's use of peremptory strikes exercised against male members of the jury, the State failed to articulate a nondiscriminatory reason for challenging the jurors related to the particular case to be tried.

8. The Court erred in failing to require the State to articulate a nondiscriminatory reason for challenging the jurors related to this particular case.

9. The Court erred in allowing the State's witness to testify regarding the results of paternity blood tests without first laying the proper predicate.

10. The Court erred in allowing the State's witness to testify regarding the "composite" paternity blood test results, without first laying the proper predicate.

11. The Court erred in allowing the State's witness to testify regarding the "composite" blood test results,

without first establishing a scientifically reliable basis for such composite results.

12. The Court erred in allowing the State's witness to testify regarding the use of a DNA Test without first determining the admissability of such tests in accordance with the holding of the Supreme Court of the State of Alabama found in *Ex parte Waylon Dwight Perry* ___ So. 2d ___ (1991, 89-1534).

[CR46] 13. The Court erred in allowing the State's witness to testify regarding the results of the paternity blood test without first establishing that such tests were generally accepted in the scientific community.

14. The Court erred in allowing the State's witness to testify regarding the results of paternity blood tests without requiring the State to first establish that the techniques used for such tests were capable of producing reliable results and that they are generally accepted in the scientific community.

15. The Court erred in allowing the State's witness to testify regarding the results of paternity blood tests without first establishing the testing laboratory performed generally accepted scientific techniques without error in the performance or interpretation of the tests.

16. The Court erred in allowing the State's witness to testify regarding paternity blood testing without first establishing the minimal foundation of predicate including the establishment of a chain of identification from the time blood samples were taken to the time the samples were analyzed, by first hand knowledge of the witness.

17. The Court erred in sustaining the State's objections to the defendant's testimony regarding his impotency or sterility.

18. The Court erred in denying the defendant's motion for directed verdict at the close of the State's evidence.

19. The Court erred in denying the defendant's motion to exclude the State's evidence, or portions thereof, at the close of the State's case.

[CR47] 20. The Court erred in denying the defendant's motion for directed verdict at the close of all the evidence.

21. The Court erred in denying the defendant's motion to exclude the State's evidence, or portions thereof, made at the close of all the evidence.

WHEREFORE, the defendant does hereby pray that this Court will enter an Order of Judgment Notwithstanding the Verdict in the defendant's favor on all issues, or in the alternative to grant to the defendant a new trial on all issues or to alter, amend or vacate the Judgment in accordance with this Motion.

LIVINGSTON, PORTER & PAULK, P.C.

/S/ John F. Porter, III
John F. Porter, III
Attorney for Defendant
P. O. Box 1108
Scottsboro, Alabama 35768
Phone: (205) 259-1919

[CR49]

STATE OF ALABAMA, ex rel., TERESA BIBLE	)	IN THE CIRCUIT
	)	COURT FOR
PLAINTIFF	)	JACKSON
	)	COUNTY, ALABAMA
VS.	)	
	)	CASE NO:
JAMES EDWARD BOWMAN	)	CV-90-314
	)	
DEFENDANT	)	

AFFIDAVIT IN SUPPORT OF
POST JUDGMENT MOTION

NOW COMES the defendant herein and does hereby submit the following affidavit in support of his post judgment motion in regard to the voir dire, striking and impaneling of the jury.

Before me, the undersigned authority, in and for said county and state, did personally appear John F. Porter, III, who being known to me and being first duly sworn did depose and say as follows:

My name is John F. Porter, III and I am over the age of nineteen years. I am a licensed, practicing attorney in Scottsboro, Jackson County, Alabama and I am counsel of record and trial counsel for James Edward Bowman, Sr. in this matter. I am familiar with the proceedings surrounding the voir dire of the jury by both the State and the defendant, the various peremptory strikes exercised by the State and the impaneling of the jury. A number of jurors were summoned for jury service during the week of October 21, 1991. A copy of the juror questionnaire forms submitted by all of the potential jurors is attached hereto and incorporated herein

by reference as Exhibit "A". ** Omitted – Found at Clerk's Record, Pages 52 to 59 **

From this list of jurors, a panel of thirty-six (36) was drawn as the jury venire for this particular case from which the jury would be selected. Of this panel of 36, 24 jurors were female and [CR50] 12 were male.

After voir dire was completed, the Court excused three jurors for cause, being Davis Cooper, Dennis Young and Brenda Sealey. Thereafter, the State was allowed ten peremptory strikes. Of those ten strikes, nine strikes were of male jurors. The jury impaneled for this case consisted entirely of women jurors. The strike list used by the defendant containing the names of all the jurors and the strikes exercised by the State and the defendant is attached hereto and incorporated herein by reference as Exhibit "B".

/S/ John F. Porter, III
John F. Porter, III

SWORN to and subscribed before me on this the 3rd day of January, 1992.

/S/ Judith L. Woodill
Judith L. Woodill

LIVINGSTON, PORTER & PAULK, P.C.

/S/ John F. Porter, III
John F. Porter, III
Attorney for Defendant
P. O. Box 1108
Scottsboro, Alabama 35768
Phone: (205) 259-1919

EXHIBIT "B"

[CR60] Jury Chart showing Strikes

Walter Adkins 28	Evelyn Baker 10	Ken Bishop 27	Mildred Cabiness 3	Brian Casey 23	Debra Clay 11	Freida Culver 36	Truitt Davis 17	Teresa Forrest 6	Trula Gray 2
Joyce Hayes 9	Rhonda Johnson 26	Willodean Kilgore 31	William Lusk 16	Sharon Medley 39	Denise Morris 21	Eva Parks 32	Billy Prince 5	Barbara Rogers 25	Brenda Seeley
Elaine Steeley 18	Randell Sullivan 7	Ella Thomas	Ira Venable 29	Betty Whatley 4	Jeri Wilhelm 12	Ozell Womack 40	Dennis Young 24	Teresa Arnold 33	Avile Baldwin 14
John Brooks 19	Faye Carter 8	Jo Chrisman 30	Davis Cooper 15	Norman Daniels 34	Angela Evans 1	20	35	13	38

STRIKE NUMBER	M_1	M_2	M_3	F_4	M_5	M_6	M_7	M_8	M_9	M_{10}	11	12	13	14
STATE/PLAINTIFF STRIKE	29	23	17	32	5	28	16	27	19	M_{11}				
DEFENDANT'S STRIKE	8	25	36	11	9	10	4	12	39	40	15			
	F	F	F	F	F	F	F	F	F	F	M			

Ira Venable 29
Brian Casey 23
Truitt Davis 17
Eva Parks 32
Billy Prince 5
Walter Adkins 28
William Lusk 16
Ken Bishop 27
John Brooks 19
Norman Daniels 34

EXHIBIT "B"

09

[CR61]

THIRTY-EIGHTH JUDICIAL CIRCUIT OF ALABAMA
IN THE CIRCUIT COURT OF
JACKSON COUNTY, ALABAMA

STATE OF ALABAMA, ex rel., TERESIA BIBLE, PLAINTIFF	)	CIVIL ACTION NO.: 90-314
VS.	)	
JAMES EDWARD BOWMAN, DEFENDANT	)	

ORDER ON RULE 59 MOTION

This court has reviewed the motion of the defendant under Rule 59 and has reviewed the voir dire conducted on trial of this cause, and the affidavit of counsel for the defendant reflecting the manner in which the jury was impanelled.

The argument of the defendant that he was entitled to have the jury venire quashed in that it was improper for the court to overrule his *Batson* challenge on the basis of gender exclusion is not well taken. Defendant cites the United States Court of Appeals Ninth Circuit case of *U. S. v. DeGross*, 913 Fed. 2d 1417 (1990), and contends that it is authority for applying *Batson v. Kentucky*, 90 L. Ed. 2d 69 (1986) to gender discrimination. At trial, the court denied the defendant's *Batson* challenge and did not require the state's attorney to explain his peremptory challenges of male jurors. It is uncontradicted that there were twelve male persons in a jury venire of thirty-six. Two of those

jurors were excused for cause by the court, and they were Randall Sullivan, Dennis Young, and Brenda Sealey, contrary to the affidavit of defendant's counsel which identifies Davis Cooper as one of the jurors which were removed for cause by the court. Nevertheless, of the remaining thirty-three jurors, ten were male jurors. The defendant was allowed eleven peremptory challenges, and the state was allowed ten peremptory challenges. Nine of the state's peremptory challenges were exercised as to male jurors, and one of the defendant's peremptory challenges was exercised as to a male juror. The resulting jury which was impaneled for the trial and which heard the evidence consisted of all females. The Ninth Circuit Court of Appeals opinion to the contrary, this court is of the opinion that the correct law in this state is as announced by the Alabama Court of Criminal Appeals in *Murphy v. State*, ___ So. 2d ___ (Court of Criminal Appeals ___ October 11, 1991). In that case it was held that the *Batson* doctrine does not extend to gender-based strikes.

Another argument of the defendant is that testimony of Dr. [CR62] Leigh Ann Harmon was improperly admitted to express opinions regarding "composite" paternity blood test results without a proper predicate being laid. The court has examined the witness's testimony and, first of all, is of the opinion that the DNA test involved as one of the three tests made under the supervision of the witness was not the same test in which the Supreme Court of Alabama addressed its six point review test in the *Ex Parte Perry* case. The witness explained that the DNA paternity test is "entirely different" from the DNA forensic test which the Supreme Court of Alabama in the *Perry* case addressed. Transcript, page R-56, 57. The court

is of the opinion that the proper predicate was laid for the opinion being expressed by the witness, and that any objection to that opinion goes to the weight of the witness's opinion and not to its admissibility.

The defendant argues that the chain of custody of the blood samples which were tested was not sufficiently shown as a predicate in order to permit test results to be given in evidence. It is the opinion of the court, upon review of the testimony, that the test samples were taken in the manner contemplated by the statute, § 26-17-12, *Code of Alabama, 1975*, as amended. In the opinion of the court, the predicate laid by the state's direct examination of the witness met the requisite foundation outlined by the court in *Lyle v. Eddy*, 481 So.2d 395 (1985), and the argument of the defendant as to the chain of custody of the blood samples, under the evidence adduced, including the photographs and the fingerprints of the parties from whom the samples were taken, goes to the weight of the evidence and not to its admissibility. There was first hand testimony from more than one witness that blood samples were taken from the mother, the child, and the defendant by a phlebotomist, the date they were taken, that the phlebotomist identified each sample with the photograph of each party and the fingerprints of each party, initialed each vial in which the samples were placed, sealed, by identification, and transmitted them to the witness Harmon, and that the chain of custody was documented on a form of the laboratory, that the blood samples were received by the witness into the laboratory, checked for sign of tampering, and that there was no sign of tampering, and the witness identified the defendant and the mother of the child as two persons shown in the

photographs. (Transcript, pages R-41 – R-53) The mother testified that the samples were taken by the laboratory-employed phlebotomist identified by the witness Harmon, that the samples were signed, photographs of each party were taken, and thumb prints were taken, and the defendant himself acknowledged that his blood sample was taken by the phlebotomist on the same date, that his photograph was the one attached to the sample, and that his signature appeared under the thumb print. The court is of the opinion that the objection of defendant to the chain of custody goes to the weight of the evidence and not to its admissibility. The other grounds of the defendant's Rule 59 motion have been [CR63] examined are equally without merit.

ACCORDINGLY, IT IS ORDERED AND ADJUDGED:

1. That the Rule 59 motion of the defendant for new trial, or, in the alternative, for a judgment not withstanding the verdict, or to alter, amend or vacate the judgment, is denied.

ORDERED this the 6th day of January, 1992.

/S/ Robert L. Hodges
Robert L. Hodges, Circuit Judge

William Tally, Assistant District Attorney
John Porter, III, Attorney

STATE OF ALABAMA – JUDICIAL DEPARTMENT
THE COURT OF CIVIL APPEALS
OCTOBER TERM 1991-92

2910210

J.E.B.

v.

State of Alabama ex rel T.B.

Appeal from Jackson Circuit Court

(CV-91-314)

WRIGHT, Retired Appellate Judge

The State of Alabama, on behalf of T.B. (mother), filed a complaint for paternity and child support against J.E.B. (father) in the District Court of Jackson County. After a hearing the district court entered an order adjudicating paternity and ordered the father to pay child support. The father filed notice of appeal to the circuit court. A jury trial was held. [1]

The jury returned a verdict in favor of the mother. The trial court entered an order accordingly. The father appeals.

Initially the father asserts that the trial court erred in overruling the father's objection to the State's peremptory jury strikes based on his allegation that the State's strikes were based entirely on gender.

The father insists that the State improperly used its peremptory strikes to purposefully eliminate men from the jury. He suggests that such actions were in violation of his rights to equal protection and due process. He

requests that this court extend the *Batson v. Kentucky*, 476 U.S. 79 (1986), principle, which prohibits peremptory strikes based solely upon race, to include gender-based strikes.

This issue has previously been addressed by the court of criminal appeals and the supreme court. *Fisher v. State*, 587 So. 2d 1027 (Ala. Crim. App.), *cert. denied* 587 So. 2d 1039 (Ala. 1991); *Daniels v. State*, 581 So. 2d 536 (Ala. Crim. App. 1990), *cert. denied* 581 So. 2d 541 (Ala. 1991); *Dysart v. State*, 581 So. 2d 541 (Ala. Crim. App. 1990), *cert. denied* 581 So. 2d 545 (Ala. 1991). The supreme court recently revisited the issue in *Ex parte Murphy*, [Ms. March 20, 1992] [2] ___ So. 2d ___ (Ala. 1992), and declined to extend the *Batson* principle to gender-based strikes. We must follow the decisions of the supreme court. § 12-3-16, Code 1975.

The father next contends that the blood test results should have been excluded because the State failed to establish a proper chain of custody. He specifically asserts that the phlebotomist's failure to testify was fatal to the admissibility of the blood test results.

Dr. Leigh Ann Harmon, the supervisor of the University of Alabama at Birmingham Immunogenetics/DNA Diagnostic Laboratory, testified that along with the blood samples she received an Immunogenetics/DNA Diagnostic Laboratory Paternity Chain of Custody Document. The document was developed in order to allow the supervisor to confirm the chain of custody without having to bring numerous laboratory personnel to court. Dr. Harman thoroughly discussed the document and its

safety devices. She testified in detail as to her laboratory's procedures for drawing blood samples and assuring proper identification of both the individuals having the test and the blood samples drawn from those individuals. She testified that once the blood samples [3] were received by the laboratory they were checked for any sign of tampering. She stated that there was no sign of tampering, that the box was taped, the tape was intact, and the tape was initialed by the person who sealed and delivered it.

We find that a proper chain of custody was sufficiently established by Dr. Harman's testimony. *Lyle v. Eddy*, 481 So. 2d 395 (Ala. Civ. App. 1985).

The father asserts that the trial court erred in allowing into evidence the results of the DNA test without first establishing that the test "met the requirements of the recent supreme court holding in the case of *Ex parte Perry*, 586 So. 2d 242 (Ala. 1991)."

Ex parte Perry pertains to the admissibility of DNA test results in a forensic setting. That case clearly distinguishes between forensic testing and clinical testing (which we have in this case). The strict admissibility requirements of *Ex parte Perry* are not applicable in a paternity action.

The judgment of the trial court is affirmed.

The foregoing opinion was prepared by Retired Appellate Judge L. Charles Wright while serving on active duty status as a judge of this court under the [4]

provisions of § 12-18-10(e), Code 1975, and this opinion is hereby adopted as that of the court.

AFFIRMED.

All the judges concur.

OFFICE OF
CLERK OF THE COURT OF CIVIL APPEALS
STATE OF ALABAMA
MONTGOMERY
CV 91-314

Re: CIV. 2910210 July 17, 1992

J.E.B. vs. *STATE OF ALABAMA, ex rel T.B.*

Appellant Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Court of Civil Appeals:

____ Court reporter granted additional time to file reporter's transcript to and including

____ Clerk/Register granted additional time to file clerk's record/record on appeal to and including

____ Appell___ granted 7 additional days to file brief(s) to and including

____ Appellant(s) granted 7 additional days to file reply brief(s) to and including

____ Record on Appeal filed on this date.

____ Appendix Filed on this date.

____ Submitted on Briefs

XXX Application for rehearing overruled. No opinion written on rehearing.

___ Permission to file amicus curiae briefs granted.

___ Rules suspended

___ Transferred to the Supreme Court for lack of jurisdiction. A/N

/s/ John H. Wilkerson, Jr.
Clerk, Court of Civil Appeals of Alabama

THE STATE OF ALABAMA – JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

October 23, 1992

1911717

Ex parte J.E.B.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS

(Re: J.E.B. v. State of Alabama, ex rel. T.B.)

(CIV 2910210 (Jackson CV-91-314))

CERTIFICATE OF JUDGMENT

Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

KENNEDY, J. – Hornsby, CJ., Maddox, Shores and Houston, JJ., concur.

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(8)

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In The

Supreme Court of the United States

October Term, 1993

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SUPREME COURT, U.S.

J.E.B.,

Petitioner,

v.

T.B.,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of Alabama

PETITIONER'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

The single question presented to this Court for review is whether a male defendant in a civil action brought by the State of Alabama, has the right, under the Equal Protection Clause of the 14th Amendment to the United States Constitution, to challenge the State's use of its peremptory jury strikes which deliberately excludes males from the jury panel.

PARTIES IN COURT BELOW

Petitioner: J.E.B.

Respondent: State of Alabama, ex rel. T.B.

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CITATION OF OFFICIAL REPORT

Certiorari to the Alabama Supreme Court is sought from the following opinion:

J.E.B. v. State of Alabama, Ex rel T.B., 606 So. 2d 156 (Ala. Civ. App., 1992), *cert. denied*, No. 1911717 (Oct. 23, 1992).

STATEMENT OF JURISDICTIONAL GROUNDS

Jurisdiction for review by this Court was invoked by your Petitioner pursuant to 28 USC § 1257(a). The holding of the Circuit Court of Jackson County, Alabama, as affirmed by the Alabama Court of Civil Appeals, with certiorari denied by the Alabama Supreme Court, denies the Petitioner his rights to the equal protection of the laws under the 14th Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS

United States Constitution

Amendment XIV
Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny

any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This action originated in the Circuit Court of Jackson County, Alabama upon the Petition of the State of Alabama, ex rel. T.B., alleging J.E.B. to be the father of a child born to T.B. The matter was called for trial on October 21, 1991 and the Court proceeded to empanel a jury by the struck jury method. After voir dire by the Court and all parties, the jury was struck. Counsel for the State used nine of its ten peremptory strikes to eliminate male members of the venire. Before the jury was empaneled. Petitioner challenged the State's use of its peremptory strikes to eliminate the male jurors from the panel based solely upon their gender, in violation of the Equal Protection clause of the 14th Amendment to the United States Constitution by requesting the Trial Court to conduct a hearing in the manner established by this Court in *Batson v. Kentucky*, 476 U.S. 79 (1986), to determine the discriminatory nature of the State's use of its peremptory strikes. The Court overruled Petitioner's objection without hearing and denied his request to follow the procedures established by this Court in *Batson v. Kentucky*.

Specifically, prior to the jury being empaneled. Petitioner made the following challenge to the State's strikes:

MR. PORTER: Judge, before the jury is empaneled, I propose to the Court that I do not know the appropriate method to do

this, we would challenge the State's strikes on the *Batson* decision and other decisions that have followed that I have heard and understand that gender based strikes based upon gender are just as [in]valid on race strikes based upon the race – the State strikes with the exception of one were males. Virtually none of them answered any questions whatsoever which would show prejudice or bias in any way, and I submit to the Court that they were basically struck solely upon gender.

THE COURT: You're talking about gender strikes?

MR. PORTER: Yes, sir. Gender strikes. Again, I propose to the Court that I don't know exactly how to do this. I have never done it especially on gender.

THE COURT: You are not raising a race question? I am going to deny your motion – your challenges – on the jury that's been empaneled on the basis of gender strikes.

MR. PORTER: We would also point out to the Court that the venire is made up of approximately seventy-five percent women, which also adds to the fact

that he has struck all but one of the men.

THE COURT: For the record, I will relate that there were 62 jurors on this morning's voir dire, and I did not need all 62 so I instructed the Clerk to take every other name until we got 36. That's the way these people wound up where they are. I overrule your objection and deny your motion.

(A jury was sworn and empaneled.) [JA 23]

Thereafter, a jury consisting of 12 females was empaneled and the case proceeded to trial. At the conclusion of the trial, the jury found and determined J.E.B. to be the father of the child, and the Court entered judgment thereon. [JA 24]

Petitioner subsequently filed a Post-Judgment Motion requesting an Order of Judgment Notwithstanding the Verdict, or in the alternative, a New Trial. [JA 26] As a portion of the grounds for such Post-Judgment Motion, Petitioner again raised the defendant's right to Equal Protection of the law as guaranteed by the United States Constitution. Petitioner challenged the State's use of its peremptory strikes to strike males from the jury panel based solely upon their gender and further challenged the Court's failure to require the State to articulate a nondiscriminatory reason for challenging the jurors, in accordance with the procedures established by this Court

in *Batson v. Kentucky*. In denying Petitioner's Post-Judgment Motion, the Trial Court specifically held "that the *Batson* doctrine does not extend to gender based strikes".

Thereafter, on January 24, 1992, Petitioner gave Notice of Appeal to the Alabama Court of Civil Appeals from the Court's Orders establishing paternity. Petitioner submitted the following issue to the Alabama Court of Civil Appeals:

> "The Trial Court erred in failing to allow the Appellant to challenge the State's peremptory jury challenges based solely upon gender in violation of his rights to equal protection of the law." (Appellant's Brief, p.6)

In affirming the Trial Court's holding, the Court of Civil Appeals opined that the Alabama Supreme Court had "declined to extend the *Batson* principle to gender based strikes", based upon the decision of *Murphy v. State*, 596 So. 2d 42 (Ala. Crim. App., 1991), *cert. denied*, 596 So. 2d 45 (1991), *cert. denied*, 113 S. Ct. 86 (1992). [JA 38] Thereafter, on July 17, 1992, the Alabama Court of Civil Appeals denied Petitioner's Application for Rehearing. [JA 38]

On July 31, 1992, Petitioner filed his Petition for Writ of Certiorari to the Court of Civil Appeals, in the State of Alabama Supreme Court and again presented the issue of gender based jury strikes to the Court, specifically stating as follows:

> "The Petitioner seeks to have this Court reconsider and overrule the majority opinion in *Murphy v. State*, 596 So. 2d 42 (Ala. Civ. App., 1991), cert denied 596 So. 2d 45 (1991), and to adopt as the majority opinion the reasoning issued by

Justice Maddox in his dissent which strikes down gender based peremptory jury challenges."

On October 23, 1992 the Alabama Supreme Court denied Petitioner's Writ of Certiorari to the Alabama Court of Civil Appeals. [JA 43]

The Petition for Writ of Certiorari to the Alabama Supreme Court was presented to this Court on January 20, 1993. Certiorari was granted on May 17, 1993 and is now before this Court for review.

SUMMARY OF ARGUMENT

The 14th Amendment to the Constitution of the United States guarantees against governmental action which differentiates between persons because of their inclusion in certain groups. In order to survive the heightened scrutiny accorded to the classification of individuals based upon their gender, the state must show that the classification is substantially related to an important governmental interest. The use of peremptory jury strikes to exclude jurors from the jury panel solely because of their gender violates the equal protection rights of both the excluded juror and the nonstriking party. Further, such a discriminatory action within the Court system casts a disparaging shadow upon the entire judicial process. The protection previously extended to jurors based upon their race should, upon the equal protection principles of the 14th Amendment, be applied to jurors who are excluded from the jury process solely by the accident of birth.

Legal scholars and trial advocates have historically recognized the importance of the peremptory challenge in securing a fair and impartial trial. However, there is no constitutional basis for exercising this privilege and its use has been altered and modified by legislative enactment and courtroom practice. Court imposed restrictions on its use have evolved in order to promote the principles of equal protection and the elimination of wrongful discrimination in the jury selection process. Therefore, the significant state interest in providing litigants, both civil and criminal, a fair and impartial trial can only be accomplished by applying the principles found in *Batson v. Kentucky* to preclude gender-based peremptories.

The State's use of its peremptory strikes to eliminate male jurors from the jury solely because of their gender denies to the Petitioner and the excluded jurors the equal protection of the law.

ARGUMENT I

THE EQUAL PROTECTION PRINCIPLES UPON WHICH *BATSON V. KENTUCKY* AND ITS PROGENY ARE FOUNDED ALSO PROHIBIT PEREMPTORY CHALLENGES BASED SOLELY UPON A PERSON'S GENDER.

Do the underlying principles of the equal protection clause set out in *Batson v. Kentucky* also apply to the use of peremptory jury strikes which are based solely upon a person's gender? A logical and constitutionally reasoned review requires an affirmative response.

The 14th Amendment to the United States Constitution provides in part that "no state shall . . . deny to any person within its jurisdiction the equal protection of the law." This "Equal Protection Clause" has been interpreted to provide to the citizens of the various states protection from discriminatory practices under numerous and diverse circumstances. A heightened level of scrutiny has been extended to those included in "cognizable" groups that have been subject to historical discriminatory practices. Such protection has been applied to discrimination against persons because of their race, national origin, alienage, religion and *gender*. Although a level of scrutiny applied to protect these groups may vary, each of them has been extended some heightened level of protection under the Equal Protection Clause.

Over the years this Court has developed different levels of scrutiny depending upon the circumstances and historically unequal treatment of the particular cognizable group. Generally, if the state's interest being promoted by the classification is insufficient, then the discriminatory treatment must be abolished. State supported action which makes a distinction based solely upon one's gender, is subject to heightened scrutiny under the Equal Protection Clause of the 14th Amendment. Only if the proponent of the action can prove that the gender-based distinction is substantially related to a sufficiently important governmental interest can the distinction be maintained. *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982); *Craig v. Boren*, 429 U.S. 190 (1976).

Therefore, gender, like race, is a protected classification which requires heightened scrutiny by the Court.

The gender characteristic "frequently bears no relation to ability to perform or contribute to society," *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973), and generally "provides no sensible grounds for differential treatment," *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). The gender based protection of the 14th Amendment applies to males as well as females. *Orr v. Orr*, 440 U.S. 268, 278-80 (1979); *Craig v. Boren*, 429 U.S. at 204.

The Sixth Amendment protection this Court extended to persons who may be excluded from the jury venire because of their race in *Strauder v. West Virginia*, has likewise been extended to persons based upon their gender. *Taylor v. Louisiana*, 419 U.S. 522 (1975). This Court held in *Holland v. Illinois*, 493 U.S. 474 (1990), that race based exclusions are no more permissible at the individual petit jury stage than at the venire stage. Likewise, *gender-based* exclusions should be no more permissible at the individual petit jury stage than at the venire stage.

No substantial state interest is promoted by allowing jurors to be peremptorily eliminated from the jury solely because of the accident of their birth. The interest of the state in a jury trial, whether it be civil or criminal, is to see that the individual jurors are selected in a fair, impartial and non-discriminatory manner. Purposeful discrimination in the selection of the jury "violates a defendant's rights to equal protection because it denies him [or her] the protection that a trial by jury is intended to secure". *Batson*, 476 U.S. at 86. Although that statement was made as it relates to racial discrimination, the same logic and reasoning applies to discrimination in the selection of jurors based upon their gender. Discrimination in the

exercise of peremptory challenges undermines the litigant's perception that he is getting a fair trial, and that justice has been served. Still, the Court went further when it held unequivocally and clearly, without limitation to race, that "the privilege to strike individual jurors through peremptory challenges is subject to the commands of the Equal Protection Clause." *Batson*, 476 U.S. at 89. The U.S. Court of Appeals for the Ninth Circuit has specifically stated that "gender discrimination during jury selection is not substantially related to the achievement of an important governmental interest" and is therefore prohibited by the principles of equal protection. *United States v. DeGross*, 913 F.2d 1417, 1422 (9th Cir. 1990).

Since *Batson*, the fact situations of the significant decisions of this Court dealing with the discriminatory use of peremptory challenges have dealt with the issue of race. *Powers v. Ohio*, 499 U.S. ___, 111 S. Ct. 1364 (1991); *Edmonson v. Leesville Concrete Co.*, 500 U.S. ___, 111 S. Ct. 2077 (1991); *Georgia v. McCollum*, 505 U.S. ___, 112 S. Ct. 2348 (1992). While earlier Supreme Court decisions have not reached the issue of gender-based peremptions, nothing in the wording of those decisions limits their holdings to the specific context in which they were decided. However, the Court has stated, without limitation to the issue of race that "if a court allows jurors to be excluded because of *group bias*, (emphasis added) it is a willing participant in a scheme that could only undermine the very foundation of our system of justice -- our citizens' confidence in it," *McCollum*, 112 S. Ct. at 2354. The Court had earlier stated that "[b]y enforcing a *discriminatory* peremptory challenge, the Court has not only made itself a party to the [biased act], but 'has elected to place its

power, property and prestige behind the [alleged] discrimination'." *Edmonson*, 111 S. Ct. at 2085 (emphasis added) (citations omitted). Although rendered in cases involving racial discrimination, the Court's holdings imply, if not stated unquestionably, that the Equal Protection principles set out in *Batson* are applicable to all cognizable groups which are traditionally protected by the 14th Amendment. The implication is made clear in this Court's opinion in *Georgia v. McCollum* where, quoting from *Ristaino v. Ross*, 474 U.S. 589, 596 (1976), it stated that "In our heterogeneous society policy as well as constitutional considerations militate against the divisive assumption – a *per se* rule – that justice in a court of law may turn upon the pigmentation of skin, *the accident of birth*, or the choice of religion." 112 S. Ct. at 2359 (emphasis added). Even opinions which did not agree with the majority holding in the *Batson* line of cases have recognized the logical inclusion of gender-based strikes. Then Chief Justice Burger's dissent in *Batson* reasoned that the application of traditional equal protection principles to discriminatory peremptory challenges based upon other protected classifications, including gender, would supply the same measure of protection as the majority opinion applied to race-based exclusions. *Batson*, 476 U.S. at 124.

If the principles of *Batson* do not apply to gender-based peremptory jury strikes then this Court's expressed purpose of eliminating racial discrimination in the jury selection process would be partially compromised. Black jurors may be treated differently based upon their gender. For example, in a hypothetical situation where a white female juror, a black female juror and a black male juror are peremptorily struck, each may find a different result

if they object to being eliminated. The white woman juror's cries of discrimination will not even be heard by the court. The black woman juror's objection will be given an audience by the court but the striking party need only articulate that she was struck, not because of her race, but because of her gender. On the other hand, the black male juror's objection will be sustained and he will be seated on the jury. Thus, in any given case, if gender-based strikes are not prohibited, it will be constitutionally permissible to peremptorily strike all of the black jurors of one gender or the other without violating the Equal Protection Clause of the Fourteenth Amendment. Such result is certainly not that which was intended by this Court in *Batson*. The decisions of the Court in *Powers*, *Edmonson*, and *McCollum* have expanded rather than restricted the principles of Equal Protection. Extending these principles to classifications protected by the court's heightened scrutiny, including gender, is the next logical step in completing the process of making the exercise of peremptory challenges subject to the Equal Protection Clause of the Fourteenth Amendment.

Therefore, under the heightened scrutiny of equal protection principles applicable to gender-based classifications, the state's use of its peremptory challenges to eliminate males from the jury solely because of their gender violates the Equal Protection Clause of the 14th Amendment and is governed by the principles set out in *Batson*.

ARGUMENT II

THE USE OF DISCRIMINATORY, GENDER-BASED JURY STRIKES HAS A SUBSTANTIAL ADVERSE IMPACT UPON THE EXCLUDED JUROR, THE JUDICIAL SYSTEM AND SOCIETY AS A WHOLE

With its foundation resting securely on the third party standing issue found in *Batson* and *Powers*, the Court in *Georgia v. McCollum*, 505 U.S. ___, 112 S. Ct. 2348 (1992) unquestionably established that either party to a criminal or civil proceeding has standing to challenge the exclusion of a juror solely because of that juror's race. This standing is extended to the litigant, in part, because of the harm done to the excluded juror as well as to society as a whole. *Batson*, 476 U.S. at 87; *Powers*, 499 U.S. ___ (1991); *Edmonson*, 500 U.S. ___, 111 S. Ct. 2077 (1991). "Jury service is an exercise of responsible citizenship by all members of the community, including those who otherwise might not have the opportunity to contribute to our civic life." *Powers*, 499 U.S. ___ (1991). When a potential juror is excluded from jury service based on a reason unrelated to that potential juror's ability to serve, he or she is denied the opportunity to participate in the judicial process and receives the message that their contributions are less important to society. Citing as authority *Carter v. Jury Commission of Green County*, 396 U.S. 320 (1970), the *Powers* Court affirmed that a State may not extend the right, privilege or duty of jury service to some and withhold the same from others solely on racial grounds. *Powers*, 499 U.S. ___ (1991).

In the instant case, following the reasoning of *Batson*, the nine men struck from the jury panel by the state were denied the right to serve on the jury simply because of

their gender. A juror's competence to serve on a jury "ultimately depends on an assessment of individual qualifications and ability to impartially consider" the evidence of a particular case regarding the type of case, the parties involved and the jurors expressed views on the matter. *Batson*, 476 U.S. at 87. A juror's gender is completely unrelated to the ability of that juror to contribute to the process.

Purposeful, unconstitutional discrimination in the exercise of peremptory jury strikes based solely upon a jurors gender destroys confidence in the fairness of the judicial system. "The opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principle justifications for retaining the jury system." *Powers*, 499 U.S. ___, 111 S.Ct. at 1368. It is this *opportunity* to serve, and to not be summarily excluded because of discriminatory presumptions, which gives citizens the hope of participation in the fair administration of justice. "Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process." *Id*. 111 S.Ct. at 1369.

The discriminatory exclusion of jurors because of their gender not only violates the objecting party's rights under the 14th Amendment, and tarnishes the Court's image before its citizens, but also violates the equal protection rights of the wrongfully excluded jurors. *McCollum*, 505 U.S. ___, 112 S.Ct. at 2357; *Edmonson*, 500 U.S. ___, 111 S.Ct. at 2081; *Powers*, 499 U.S. ___, 111 S.Ct. at 1368. Since the individual juror who had been wrongfully excluded has no realistic means of protecting his or her own rights, the nonstriking party has been granted

standing to assert the equal protection rights of one so excluded. *Edmonson*, 500 U.S. ___, 111 S.Ct. at 2081.

The *Powers* Court found that the relationship between the excluded juror and the defendant to be significant, even though they were not of the same race. Both the litigant and the excluded juror have a common interest in eliminating discrimination from the judicial process. This "congruence of interests makes it necessary and appropriate for the defendant to raise the right of the juror". *Powers*, 499 U.S. ___, 111 S.Ct. at 1372. As citizens, the Petitioner and the excluded jurors, Mr. Venable, Mr. Casey, Mr. Davis, Mr. Prince, Mr. Adkins, Mr. Lusk, Mr. Bishop, Mr. Brooks and Mr. Daniels, each have an interest in eliminating gender bias and discrimination from the courthouse.

The barrier to suit brought by an excluded juror is so great that he or she has no realistic opportunity to assert their own rights. The litigant is granted the burden of protecting those rights in their stead. *Id*. 499 U.S. ___, 111 S.Ct. at 1364.

Still, there must be some governmental action or involvement in the discriminatory practice before the 14th Amendment provides protection. In *Batson* and *Powers* the discriminatory peremptory strikes were exercised by the state prosecutor, involving obvious state action. In *Edmonson* and *McCollum* the exclusions were made by legal counsel acting on behalf of private party with no employment connection with the government. Yet the Court found there to be sufficient state involvement in the process to invoke the 14th Amendment protection because of the state's promotion of the judicial

process. In the matter presently before the Court, which is civil in nature, the action was brought by the State of Alabama through the District Attorney's office and is now pursued on behalf of the state by the Assistant Attorney General for the State of Alabama, on behalf of T.B. The Alabama Court of Civil Appeals in its opinion recognized this relationship in its opinion which began "The State of Alabama, on behalf of T.B. (mother) filed the complaint for paternity and child support". *J.E.B. v. State Ex rel. T.B.*, 606 So. 2d 156 (1992). Thus, much like *Batson* and *Powers*, the state's involvement and support of the discriminatory practice is direct in nature.

Therefore, the use of gender-based peremptory strikes, like those based upon race, casts doubt upon the integrity of the jury selection process and the Court's ability to actually provide the citizens "equal protection under the law."

ARGUMENT III

APPLYING THE STANDARDS OF *BATSON* AS EXTENDED TO GENDER BASED PEREMPTORY JURY STRIKES, THE FACTS OF THE CASE PRESENTLY BEFORE THE COURT ESTABLISH A VIOLATION OF THE EQUAL PROTECTION CLAUSE SUCH THAT A REMAND IS REQUIRED.

In order to sustain an equal protection objection to the use of peremptory jury strikes, the party making such challenge (whether prosecutor, plaintiff or defendant in a criminal or civil action) carries the burden of proving a multi-pronged standard. Under these *Batson* standards, as

extended by *Powers, Edmonson* and *McCollum*, upon challenge by the non-striking party, the Trial Court must make the following determinations:

> 1. Does challenging party or the excluded juror or jurors belong to a cognizable group entitled to protection under the Equal Protection Clause.
>
> 2. Were members of the cognizable group removed from the panel by peremptory strikes.
>
> 3. From a totality of the circumstances, was there an inference raised that the opposing party used its peremptory strikes to exclude the veniremen from the petit jury on account of their inclusion in the protected group.
>
> 4. Once the challenging party has made a prima facie showing of purposeful discrimination, the striking party come forward with an articulated neutral explanation for excluding such jurors.

If the challenging party establishes a prima facie showing that the jurors were discriminatorily excluded, and the striking party cannot articulate a sufficiently neutral reason for the exercise of its strikes against those jurors, it would be reversible error for the Trial Court to allow such strikes. An examination of each of these factors respectively in the context of the facts of the present case will reveal a clear violation of the petitioner's equal protection rights under the 14th Amendment.

(1) Is the petitioner or are any of the excluded veniremen a member of a cognizable group entitled to the protection of the 14th Amendment? The petitioner is a white male. The excluded jurors, save one, were of the

same race and gender. White males comprise a cognizable protected classification. *Mississippi University for Women v. Hogan, supra* (males); *Craig v. Boren*, 492 U.S. 190 (1976) (males); *Roman v. Abrams*, 822 F.2d 214 (2d Cir. 1987), *cert. denied*, 489 U.S. 1052 (1989) (whites). Thus, the first prong of the test has been satisfied.

(2) Did the striking party use its peremptory challenges to remove members of this cognizable group? Yes. The State used nine out of its ten peremptory strikes to remove males from the jury panel.

(3) Has the petitioner raised in inference that the State used its peremptory challenges to exclude male veniremen from the jury because of their gender?

The jury venire consisted of thirty-six jurors, twelve male and twenty-four female. Two of the male jurors and one of the females were struck by the State for cause [JA 20-21]. The panel presented to the parties for the exercise of the peremptory challenges consisted of ten males and twenty-three females. The State exercised nine of its ten peremptory strikes to eliminate males from the jury. The only female struck by the State was juror number 32, Mrs. Eva Parks who was a friend of counsel for the defendant and attended church with him [JA 6]. The male members of the panel were particularly quiet during voir dire. Of the ten males, not challenged for cause, few of them responded to any of the voir dire questions. Mr. Casey, Juror number 23, knew Ms. B and lived in the same community with her. [JA 12] Mr. Cooper, number 15, and Mr. Bishop, number 27, were co-employees of Ms. B's father. [JA 13, 14] Juror number 19, Mr. Brooks was paying child support through the Court. [JA 18]

Therefore, the State peremptorily struck six of the male jurors who made no response whatsoever to the voir dire questions. Two of its additional strikes were made against males who, on the surface, would be more favorable to the State's position than to the petitioner. Thus, it can be inferred that the State excluded the male jurors from the panel solely because it was *presumed* that the male jurors would be more inclined to relate to Mr. B than to Ms. B. The only other logical explanation for excluding Mr. Casey and Mr. Bishop was because they knew of some character flaw or unfavorable factor about Ms. B, which was not revealed on voir dire. If that were the case, then under the fourth standard of *Batson*, the State would have articulated such reason to the Trial Court if a hearing had been held.

The example of facts which may give rise to an inference of unconstitutional exclusion as provided by the Court in *Batson* are directly on point. There, the Court opined that a pattern of strikes against jurors of the protected group may give rise to an inference of discrimination. *Batson v. Kentucky*, 476 U.S. at 97. Under Alabama's interpretation of the *Batson* principles, the Appellate Courts have held that the use of nine of twelve peremptory strikes to eliminate all blacks from the jury was sufficient evidence, in and of itself, to establish a prima facie case of deliberate discriminatory use of peremptory strikes. *Williams v. State*, 548 So. 2d 501 (Ala. Crim. App. 1988), *cert. denied*, 489 U.S. 1028 (1988). The striking of nine blacks and one white from a qualified venire consisting of ten blacks and thirty-two whites was found by the Georgia Court to be an overwhelming pattern of strikes establishing a prima facie evidence of

discrimination. *Ford v. State*, 423 S.E.2d 245 (Ga. 1992). The Georgia Supreme Court also found the prosecutions use of nine out of ten strikes against black jurors to be prima facie evidence of discrimination, even though eight of the twelve jurors ultimately selected to serve were black. *Berry v. State*, 422 S.E.2d 861 (Ga. 1992).

Additionally, the Court can consider that the State did not peremptorily strike any of the female jurors who failed to respond to the voir dire questions. The prosecutor's failure to specifically question any of the black jurors he struck, *Jackson v. State*, 557 So. 2d 855 (Ala. Crim. App. 1990), and the prosecutor's failure to engage prospective black jurors in more than "desultory voir dire" or to ask them any questions at all, before striking them peremptorily, *Parker v. State*, 568 So. 2d 335 (Ala. Crim. App.), *cert. denied*, 1990 Ala. Lexis 801 (Aug. 31, 1990), are factors supporting an inference that the challenges were, in fact, based upon group bias. Also see *People v. Smith*, 602 N.E.2d 946 (Ill. App. 1992), in which a prosecutor struck black jurors responding to certain questions, but did not strike white jurors responding in a similar manner.

The State's use of six of its peremptory strikes to exclude male jurors who had failed to respond to any voir dire questions and two male jurors who could have potentially been favorable to the State, is more than sufficient to raise an inference that they were struck solely because of their gender.

(4) Having established a prima facie case that the State had exercised its peremptory challenges to deliberately exclude potential male jurors solely because of their

gender, the burden is then placed upon the State to articulate some reason for the challenges other than their gender. If such hearing had been held by the Trial Court *at the time of trial*, the State would have been given the opportunity to explain its reasons for striking two potentially favorable jurors. However, in this case, as in *Batson*, the Trial Court summarily rejected the defendant's objection without conducting a hearing upon the issue.

Therefore, this case must be remanded with instructions to grant the Petitioner a new trial or in the alternative to conduct an evidentiary hearing in conformity with the principles set out in *Batson*.

ARGUMENT IV

THE STATE'S HISTORICAL RIGHT TO USE ITS STRIKES IN A PEREMPTORY MANNER MUST YIELD TO A CHALLENGE BASED UPON THE EQUAL PROTECTION CLAUSE OF THE 14TH AMENDMENT.

Throughout the history of jurisprudence, it has been recognized that "the right of challenge is almost essential for the purpose of securing perfect fairness and impartiality in a trial." W. Forsyth, *History of Trial by Jury* 175 (1852). While this Court has on more than one occasion extolled the virtues of the peremptory challenge by holding that "the persistence of peremptories and their extensive use demonstrate a long and widely held belief that peremptory challenge is a necessary part of trial by jury", and further that "the challenge is one of the most important of the rights secured to the accused." *Pointer v.*

United States, 151 U.S. 396 (1894). The right to employ such peremptory challenges in a trial by jury, however important to the administration of justice, has been subjected to important constitutional limits.

In his dissenting opinion in *Batson v. Kentucky*, 476 U.S. 79 (1986) Chief Justice Burger tracked the use of the peremptory challenge as far back as B.C. 104 where it was in use by the Roman government. It is stated that in the trial of a criminal case during that period, the accused and the accuser would each summon one hundred "judices" for the trial. They would then in turn proceed to summarily reject fifty of those summoned by the other party. *Id.* at 119.

In one of the premier cases before this Court dealing with peremptory challenges, the Court traced the history of the challenge to the common law of England. *Swain v. Alabama*, 380 U.S. 202 (1965). As originally allowed there, the prosecutors' unfettered use of this power led to "infinite delays and danger." *Coke on Littleton* 156 (14th ed. 1791). These abuses resulted in restrictions or limitations on the prosecution's use of its peremptories by the enactment of *The Ordinance for Inquests*, 33 Edw. 1, Stat. 4 (1305). According to this Ordinance, the prosecutor was required to give a "cause certain" for the use of its challenges. The defendant's right to peremptory challenges was likewise modified when in 1530 the number of such challenges was reduced from thirty-five to twenty. See 22 Hen. 8, c. 14, § 6 (1530); 25 Hen. 8, c. 3 (1533).

Even though the use of challenges without cause was protected as an important and essential part of a fair and just judicial system, it did not remain without change.

Thus, the use of peremptory challenges in England has survived from the early formative days of the common law until the present time. Even so, its practice has fallen into great disuse and its exercise has been rare in England for over a century. *Swain v. Alabama*, 380 U.S. at 212. The form of the exercise of peremptory challenges has been altered over the centuries, sometimes restrictions being placed on its exercise because of the unfairness resulting from the use of its privilege.

In our country, the availability of peremptory challenges during a jury trial was adopted early on by Congress. In 1790, Congress adopted an ordinance to provide the defendant with thirty-five peremptory challenges in trials for treason and twenty in trials for other specified felonies. 1 Stat. 119 (1790). The number of challenges allowed to both sides in a Federal criminal case has been altered from time to time by both statute and procedural rule. 17 Stat. 282 (1872); 36 Stat. 1166 § 287 (1911); *Fed. R. Crim. P.* 24(b).

Thus, the use of peremptory challenges became an early part of the American judicial system. The various states have likewise recognized the importance of the peremptory challenge to their respective judicial systems. Alabama initially adopted the peremptory challenge system of selecting jurors in both criminal and civil trials. However, in 1909 the Legislature abolished the system in criminal trials as it was traditionally used in favor of the "struck-jury" method. Alabama Code § 7275 (1909), under which the prosecutor and the defendant alternately "strike" the name of a venire person from a list until only 12 remain. Alabama Code § 8641 (1923); Alabama Code Title 30 § 60 (1958); Alabama Code § 12-16-100 (1975).

Rule 18.4 of the *Alabama Rules of Criminal Procedure* which now governs the striking process, provides that after the voir dire examination of the jury and challenges for cause have been exercised, the Court shall cause a list to be compiled of the remaining qualified jurors numbering not less than 36 in a capital case and 24 in a felony case. From the list the district attorney shall first strike "from the list the name of one (1) juror; the defendant shall next strike the name of one (1) juror. They shall continue to strike off names alternately until only twelve (12) jurors remain on the list, and the (twelve) 12 thus selected shall be the jury charged with the trial of the defendant." Ala. R. Crim. P. 18.4(f)(2).

In civil actions the option for the "challenge method" of jury selection was retained by the Alabama Legislature until the *Rules of Civil Procedure* were first adopted in 1975. Until then, the *Code* provided that "each party has the right to challenge four (4) of the jury peremptorily in civil cases." Alabama Code Title 30 § 53 (1958). Under Rule 47 of the *Alabama Rules of Civil Procedure*, the challenge method of jury selection had been abolished in favor of the struck jury method found in criminal cases.

As in the Federal court system, the method of jury selection in Alabama has not remained unchanged over the years. In fact, it has been in a constant, gradual state of change during this entire century. Although the "struck-jury" method of selecting the jury involves a different process than the original "challenge method." each party still maintains the right to exercise not less than six (6) challenges "without cause", thus peremptorily. *Holman v. Baker*, 277 Ala. 310, 169 So. 2d 429 (1964).

Thus, the importance of peremptory challenges to the American judicial system was recognized and established early on. However, as with the precolonial use of peremptory challenges in England, its use in this country has not been without modification and alteration. In *Swain v. Alabama*, this Court first broke with the tradition of allowing *unquestioned* use of the challenge without cause. There, it was determined that a defendant in a criminal case has the right to object to a prosecutor's use of its peremptory challenges based on the Due Process Clause of the 14th Amendment. The Court placed the evidentiary burden of proof upon the defendant to establish that a prosecutor has systematically used its challenges to exclude prospective jurors from the jury because of their race and concluded that such a pattern of systematic use must be established by a showing of exclusion by the prosecutor "for many years". 380 U.S. at 227-28. Although the Court in *Swain* upheld the State's right to exercise its peremptory challenges in a particular case based upon the juror's race, it held for the first time that such a right is not absolute and it would be *possible* to challenge the State's use of peremptory strikes under the appropriate circumstances.

The wound administered by *Swain* to the unfettered use of peremptory challenges festered within the American judicial system for more than twenty years. Prosecutor's continued to use their peremptory challenges to exclude jurors based upon the accident of their birth. As it relates to a criminal defendant's right to challenge the State's use of its peremptory strikes to eliminate jurors because of their race, the metamorphosis of the process which was begun by *Swain* culminated in the landmark

decision of *Batson v. Kentucky*, 476 U.S. 79 (1986). There, for the first time, this Court held that based upon the facts of an *individual* case, a defendant in a criminal case had the right to challenge the prosecutor's systematic exclusion of jurors based solely upon their race. In so holding, the Court recognized the standard of *Strauder v. West Virginia*, 100 U.S. 303 (1880) which held that the defendant has no right to a "petit jury composed in whole or in part of persons of his own race," *id.* at 305, but went on to say that the defendant does "have the *right to be tried by a jury whose members are selected pursuant to non-discriminatory criteria.*" (emphasis added). *Batson*, 476 U.S. at 85-86. *Batson* was based upon the premise that the Equal Protection Clause of the 14th Amendment guarantees the defendant that the State will not exclude members of his race from jury service on account of their race, or on the false assumption that members of his race as a group are not qualified to serve as a juror. *Strauder*, 100 U.S. 303 (1880); *Norris v. Alabama*, 294 U.S. 587 (1935). Quoting from *Blackstone Commentaries*, the Court held that those on a venire must be "indifferently chosen" to secure the defendant's right to the equal protection of the laws under the 14th Amendment. *Batson*, 476 U.S. at 87; 4 W. Blackstone, *Commentaries* 350 (Cooley Ed. 1899).

Batson, which concerned a criminal defendant's right to challenge the prosecutor's use of peremptory strikes to exclude members of the jury based on their race, went on to establish the procedure by which such use could be challenged. 476 U.S. at 96. In order to preserve such a challenge, the party making the challenge must:

A. Object to the use of the peremptory strikes at the earliest possible moment, certainly

before the jury is empaneled. *Dias v. Sky Chefs, Inc.*, 948 F.2d 532 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1294 (1992).

B. Show that he or she is a member of a cognizable group protected by the equal protection clause. *Batson*, 476 U.S. at 96.

C. Demonstrate that the prosecutor has exercised its peremptory challenges to remove from the venire members of the movant's race. *Id.*

Once the defendant is able to make out a prima facie case of purposeful discrimination, the burden shifts then to the prosecutor to articulate nondiscriminatory reasons for its use of the strikes.

The holding and reasoning of *Batson* has been further expanded and modified since it was rendered in 1986. In *Powers v. Ohio*, 499 U.S. ___, 111 S. Ct. 1364 (1991), the Court held that under the Equal Protection Clause of the 14th Amendment, a criminal defendant may object to the race-based exclusion of jurors through peremptory challenges whether or not the defendant and the excluded jurors shared the same race. This decision was founded in part upon the Court's recognition in *Batson* that a prosecutor's discriminatory use of peremptory challenges harms not only the defendant, but also the excluded juror and the community as a whole. In *Edmonson v. Leesville Concrete*, 500 U.S. ___, 111 S. Ct. 2077 (1991), the Court further defined the principles of *Batson* in holding that a private civil litigant may raise the equal protection claim of a person whom the opposing party has excluded from jury service on account of their race. This decision, much like *Powers*, was based in part upon the "well established rules of third party standing" holding that a defendant may raise the excluded juror's equal protection rights.

111 S. Ct. at 2081. In a further extension of *Batson*, this Court has held that the restrictions on the use of peremptory challenges applies to the defendant as well as to the prosecution in a criminal case. *Georgia v. McCollum*, 505 U.S. ___, 112 S. Ct. 2348 (1992).

Thus, the peremptory challenge, as an institution of the American judicial system, has been changed and modified by legislative enactment over the past two hundred years. Beginning with *Swain* and culminating in *Batson* and its offspring, the exercise of the peremptory challenge, has been required to adapt to the limitations and protections offered by the 14th Amendment. Yet, with these Constitutional protections in place, the "challenge without cause" may remain a vital part of the process for selecting a fair and impartial jury.

CONCLUSION

Based upon the citations of authority and the arguments contained in this Brief, the Petitioner respectfully prays that this Court will extend the *Batson v. Kentucky* equal protection principals to gender based peremptory challenges and reverse the decision of the Alabama Court of Civil Appeals, remanding this action with instructions for the entry of an order for new trial in the Circuit Court of Jackson County, Alabama, or in the alternative, to conduct an evidentiary hearing giving the State the opportunity to articulate a gender-neutral basis for its strikes.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

J. E. B.,
Petitioner,

v.

T. B.,
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF ALABAMA

RESPONDENT'S BRIEF ON THE MERITS

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QUESTION PRESENTED FOR REVIEW

1. WHETHER A MALE DEFENDANT IN AN ACTION FOR DETERMINATION OF PATERNITY HAS THE RIGHT, UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, TO CHALLENGE THE PLAINTIFF'S USE OF ITS PEREMPTORY JURY STRIKES WHICH EXCLUDE MALES FROM THE JURY.

PARTIES IN COURT BELOW

Petitioner: *J. E. B.*

Respondent: *State of Alabama ex rel. T. B.*

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

J. E. B.,
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v.

T. B.,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

STATEMENT OF JURISDICTIONAL GROUNDS

The Petitioner has invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a). The Petitioner claims that the holding of the Circuit Court of Jackson County, Alabama, affirmed by the Alabama Court of Civil Appeals, with certiorari denied by the Alabama Supreme Court, denies him his right to equal protection of the law under the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

This action was initiated pursuant to Title IV-D of the Social Security Act. (C.R. 43.) Pursuant to that act the State of Alabama ex rel. T. B. filed a civil paternity action in the District Court of Jackson County, Alabama, alleging J.E.B. to be the father of T.B.'s son. (C.R. 2-3.) The result of an HLA tissue test performed at the request of the Defendant showed a cumulative probability of paternity of 99.92% and a cumulative paternity index of 1,324 to 1. (C.R. 9.) Following a hearing the District Court adjudicated paternity and set an amount of child support. (C.R. 18.) J.E.B. then filed a notice of appeal to the circuit court for a trial de novo and a jury trial. (C.R. 1.)

The case was called for trial on October 21, 1991 and the jury was selected by the struck jury method pursuant to Rule 47, Alabama Rules of Civil Procedure. The venire from which the jury was selected consisted of thirty-six people, of whom twenty-four were female and twelve were male. (J.A. 32.) Two men and one woman were excused for cause by the Court, leaving twenty-three women and ten men from whom to choose a jury. The parties struck by turns, with the Defendant having the first and last strikes. The State used its fourth strike to remove a woman from the jury, but its other nine strikes were used against men. Defendant J.E.B. used his first ten strikes to eliminate women from the jury, and exercised his eleventh strike to eliminate the last remaining male. (J.A. 32.)

Following the striking of the jury, J.E.B. challenged the Plaintiff's strikes based on *Batson v. Kentucky*, which he stated that he understood was applicable to gender-based strikes as well as to strikes based upon race. (J.A. 22.) He also stated that the venire was made up of approximately 75% women. The Court denied the challenge. (J.A. 22.) The Court then stated for the record that there had originally been sixty-two persons in the venire and that the Court had instructed the clerk "to take every other name until we got thirty-six. That's the way these people wound up where they are." (J.A. 23.)

The case was then tried, the jury returned a verdict finding J.E.B. to be the father of the child, and the trial court entered a judgment accordingly. (J.A. 24.) A final order fixing child support at $415.71 per month pursuant to the Alabama Child Support Guidelines was entered on November 8, 1991. (C.R. 39.)

Following the denial of his post-judgment motion, J.E.B. appealed to the Alabama Court of Civil Appeals. (C.R. 64.) As one of his issues he claimed that he should have been allowed to challenge the State's peremptory jury strikes, which he claimed were based solely upon gender and violated his rights to equal protection of the law. The Court of Civil Appeals affirmed the trial court's judgment, noting that the Alabama Supreme Court had declined to extend the *Batson* rule to gender-based strikes in a series of cases decided by the Alabama Court of Criminal

Appeals, the most recent one being *Murphy v. State*, 596 So.2d 42 (Ala.Cr.App. 1991), *writ denied*, 596 So.2d 45 (Ala. 1992), *cert. denied*, 113 S.Ct. 86 (1992). (J.A. 37.) The Court of Civil Appeals subsequently denied J.E.B.'s application for rehearing (J.A. 41), and the Alabama Supreme Court denied his petition for writ of certiorari on October 23, 1992. (J.A. 43.)

SUMMARY OF ARGUMENT

Equal protection principles are not violated when litigants exercise their peremptory jury strikes, as long as those strikes are not based solely on the race of the venireperson being struck. The rule set out in *Batson v. Kentucky* and its progeny is a product of the unique history of racial discrimination in this country. *Brown v. North Carolina*, 479 U.S. 940, 942 (1986) (O'Connor, J., concurring). While classifications based upon gender are entitled to an intermediate, heightened standard of review, they are not subject to the strict scrutiny applied to race-based classifications. The state's substantial interest in exercising its peremptory strikes freely in attempting to establish the paternity of its children born out of wedlock, in light of historical prejudice against such children and their mothers, clearly meets the standard of heightened scrutiny to which gender classifications are subjected.

If the rule of *Batson v. Kentucky* were to be applied to gender-based strikes, as well as race-based strikes, every jury venire would be made up

of four or more sub-classes: white males; white females; non-white males, which class might be further divided based upon the racial makeup of the non-white members of the venire; and non-white females, likewise subject to further subdivision. In addition, once *Batson* was extended to apply to a classification subject to intermediate scrutiny, there would be no basis for not applying it to alienage, national origin, and other matters involving rights protected by the Constitution, as well as to illegitimacy. All these classifications are entitled to strict or intermediate scrutiny for Fourteenth Amendment purposes. It would quickly become impossible to select a jury without the litigants' having to be prepared to explain every jury strike. If an explanation is required, such strikes are no longer peremptory. Such a system would result in more appeals to circuit court for trials de novo, longer trials, and more appeals to the appellate courts.

In cases where it has been shown that prior discrimination based on gender has existed, such as paternity cases and rape prosecutions, it is vitally important that both parties should be able to exercise their peremptory strikes freely in order to eliminate extremes of partiality on both sides. *Holland v. Illinois*, 493 U.S. 474, 484 (1990). Children born out of wedlock and their mothers should not be denied this protection.

Finally, if this Court should decide that the *Batson* rule does apply to gender-based jury strikes, such a decision should have purely prospective

application. The new application of *Batson* would be an extension of the rule which could not have been foreseen by the parties. Application of the rule to the present case would not further the interest of overcoming historic discrimination against women, since the Petitioner in this case alleges discrimination against men. Pure prospective application would not harm the Petitioner, since a remand for new trial will only postpone the inevitable conclusion, that the Petitioner is the father of T.B.'s child. T.B. and the child, however, would continue to suffer the deprivation of support and, thus, would be harmed by such a retrial.

ARGUMENT

I. THE EQUAL PROTECTION PRINCIPLES SET OUT IN *BATSON V. KENTUCKY* AND ITS PROGENY DO NOT PROHIBIT PEREMPTORY CHALLENGES BASED UPON A PERSON'S GENDER.

In presenting this argument the Respondent notes that there is no evidence in the record of this case to indicate that the male members of the jury venire were struck because of their gender. Unlike the case of *Fisher v. State*, 587 So.2d 1027 (Ala.Cr.App.), *writ denied*, 587 So.2d 1039 (Ala. 1991), *cert. denied*, 112 S.Ct. 1486 (1992), a capital murder case in which the prosecutor acknowledged that he struck females because of his preference for male jurors in a capital case, the plaintiff's attorney in this case was not required to explain his reasons

for striking the males. It is possible that, had he been required to do so, he could have presented gender-neutral reasons for his strikes, even though he would have had no forewarning that such an explanation might be necessary.

Such an explanation is not required under the equal protection principles of the Constitution as decided in *Batson v. Kentucky*, 476 U.S. 79 (1986). When State actions are taken based upon race, alienage, or national origin, or when State actions impinge upon personal rights protected by the Constitution, this Court subjects those actions to strict scrutiny, and the actions "will be sustained only if they are suitably tailored to serve a compelling state interest." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985). While classifications based on gender call for a heightened standard of review, that standard is not as strict as the one applying to race. A gender classification will survive if it is substantially related to a sufficiently important governmental interest. Id. at 441; *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982). A similar test has been applied to classifications based upon illegitimacy, which "will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. at 441 (quoting *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982)). See also *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

In applying strict scrutiny in *Batson* to hold that peremptory jury strikes used by a prosecutor

in a criminal case could not be based solely upon race, this Court drew its opinion narrowly. Since 1986 this Court has extended the *Batson* rule to cases in which the strikes were exercised against racial groups not of the same race as the defendant (*Powers v. Ohio*, 111 S.Ct. 1364 (1991)), to civil actions (*Edmonson v. Leesville Concrete Company*, 111 S.Ct. 2077 (1991)), and to cases in which racially discriminatory strikes were exercised by the defendant in a criminal case. *Georgia v. McCollum*, 112 S.Ct. 2348 (1992).

However, this Court has consistently declined to extend the holdings of Batson beyond the realm of race. *See, e.g., United States v. Nichols*, 937 F.2d 1257 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 989 (1992); *Murchu v. United States*, 926 F.2d 50 (1st Cir.), *cert. denied*, 112 S.Ct. 99 (1991); *United States v. Hamilton*, 850 F.2d 1038 (4th Cir. 1988), *cert. dismissed*, 489 U.S. 1094 (1989), *cert. denied*, 493 U.S. 1069 (1990); *United States v. Dennis*, 804 F.2d 1208 (11th Cir. 1986), *cert. denied*, 481 U.S. 1037 (1987); *Murphy v. State*, 596 So.2d 42 (Ala.Cr.App. 1991), *writ denied*, 596 So.2d 45 (Ala.), *cert. denied*, 113 S.Ct. 86 (1992); *Fisher v. State, supra*; *Daniels v. State*, 581 So.2d 536 (Ala.Cr.App. 1990), *writ denied*, 581 So.2d 541 (Ala.), *cert. denied*, 112 S.Ct. 315 (1991). As pointed out by Justice O'Connor in her concurrence with this Court's denial of certiorari in *Brown v. North Carolina*, 345 S.E.2d 393 (N.C. 1986), *cert. denied*, 479 U.S. 940 (1986), the *Batson* rule on the exercise of peremptory challenges does not apply "[o]utside the uniquely sensitive area of race," beyond which "the ordinary

rule that a prosecutor may strike a juror without giving any reason applies." *Brown v. North Carolina*, 479 U.S. at 942 (O'Connor, J., concurring.)

While there is indeed an extensive history of gender discrimination in this country, it has never reached the level of discrimination which has historically been exercised against African-Americans, and has not given rise to the strict scrutiny of gender classifications which is granted to racial classifications. Moreover, gender discrimination has historically been directed against women, and not against men. J.E.B. should not now be able to claim heightened protection for men in a realm in which such protection has thus far not been granted to women.

Even though J.E.B. may have his cause examined with heightened, intermediate scrutiny, the State's substantial interest in exercising its peremptory strikes freely in establishing paternity of children withstands such scrutiny, particularly considering the history of discriminatory attitudes toward not only illegitimate children,[1] but also toward the women who bear them. Both the Plaintiff (State ex rel. T.B.) and the Defendant (J.E.B.) in this civil case used the vast majority of their jury strikes against people of one gender: the Plaintiff against men, the Defendant against

[1] See *Clark v. Jeter, supra*; *Pickett v. Brown*, 462 U.S. 1 (1983); *Mills v. Habluetzel*, 456 U.S. 91 (1982); *Weber v. Aetna Casualty & Surety Company*, 406 U.S. 164 (1972).

women. The actions of both parties constitute State action,[2] and are entitled to the same level of scrutiny. The actions of both parties may reasonably have been based upon the perception, supported by history, that men otherwise totally qualified to serve upon a jury in any case might be more sympathetic and receptive to the arguments of a man alleged in a paternity action to be the father of an out-of-wedlock child, while women equally qualified to serve upon a jury might be more sympathetic and receptive to the arguments of the complaining witness who bore the child.[3] Using gender-based strikes in cases in which gender-based differences in attitudes have been shown is not discrimination based upon "archaic and over-broad generalizations" about gender [*Craig v. Boren*, 429 U.S. 190, 198 (1976) (citing *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975)) (internal quotation marks omitted)], or on "outdated misconceptions concerning the role of females in the home rather than in the market-place and world of ideas" (*id.* at 199 (internal quotation marks omitted)), or reflecting "outmoded notions of the relative capabilities of men and women." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. at 441. Rather, it is a reflection of a reasonable perception by both parties, based upon historical discrimination against children born out of wedlock and their mothers by a male-dominated society.

Appellate courts throughout the United States, both state and federal, which have considered this issue are divided as to whether the rule set out in *Batson* should be extended to reach gender-based strikes. In the federal appellate courts the 9th Circuit has chosen to apply the *Batson* rule to such strikes. *United States v. DeGross*, 960 F.2d 1433 (9th Cir. 1992). However, the other federal appellate courts which have considered the issue have declined to make such an extension. *See United States v. Broussard*, 987 F.2d 215 (5th Cir. 1993); *United States v. Nichols, supra*; *United States v. Hamilton, supra*. *See also United States v. Dennis*, 804 F.2d 1208, 1210 (11th Cir. 1986) *cert. denied*, 481 U.S. 1037 (1987) (holding that black males do not "constitute a distinct, recognizable subclass of individuals who have been singled out for different treatment under the laws not simply as blacks, but as black males," and therefore do not constitute a "cognizable racial group" for purposes of *Batson*).

As shown, this Court has on numerous occasions denied certiorari to consider this issue in

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[2] *Edmonson v. Leesville Concrete Company, supra; Georgia v. McCollum, supra.*

[3] As pointed out in the amicus brief filed by the Solicitor General, studies have indicated that in certain types of cases there does appear to be a gender-associated difference in attitudes among jury members. *See* Reid Hastie, Steven D. Penrod and Nancy Pennington, *Inside the Jury* 140, 141 (1983). where it is noted that "female jurors appear to be somewhat more conviction-prone than male jurors" in rape cases, while males "were more inclined to think that a rape victim made a casual contribution to the rape, attributed more fault to the victim, and characterized her more negatively" than did females.

criminal cases. The case now before this Court is a civil paternity action. The state's substantial interest in being able to exercise its peremptory strikes in a manner which promotes its important governmental interest in establishing paternity of this child, who is himself entitled to heightened protection because of past discrimination, clearly meets the "heightened scrutiny" test which J.E.B. is entitled to have applied. Equal protection was not denied J.E.B. by the Respondent's strikes.

II. THE EXTENSION OF BATSON TO GENDER-BASED STRIKES WOULD LEAD TO THE EROSION AND ULTIMATELY TO THE DEMISE OF PEREMPTORY CHALLENGES.

As previously pointed out, strict scrutiny has been applied to equal protection questions not only in the matter of race, alienage, or national origin but also in matters involving other fundamental constitutional rights. *See Cleburne*, 473 U.S. at 440. If the *Batson* rule is applied to require gender-neutral reasons for exercising a "peremptory" strike, then it must be applied to all the classifications entitled to strict scrutiny.[4] An argument could readily be made for religion-neutral reasons, so that a lawyer defending a DUI suspect could not strike a member of a local church

[4] In *Murchu v. United States*, 926 F.2d 50 (1st Cir.), *cert. denied*, 112 S.Ct. 99 (1991), the First Circuit Court of Appeals declined to recognize Americans of Irish ancestry as a "cognizable group" for purposes of *Batson*.

which the lawyer knows to advocate total abstinence with regard to liquor as part of its religious teaching, without presenting a religion-neutral reason therefor.

Likewise, since both gender and illegitimacy are entitled to an intermediate, "heightened" level of scrutiny, an argument could be made that a party to a paternity action could not strike people who had been born out of wedlock or people who had borne such a child unless there was a reason unrelated to the question of illegitimacy. Such a result would clearly put a defendant in the case at a disadvantage.

In addition, although heightened scrutiny has not yet been applied to age, laws have been passed to prevent age discrimination in many contexts. Therefore, it could readily be argued that in a criminal action against a nineteen year old defendant for possession of marijuana the prosecutor should not be able strike younger venire members, who might be perceived as having a more permissive attitude toward the crime, unless there was an age-neutral reason for the strike. Likewise, it could be argued that the defendant's attorney in the same case could not attempt to remove older venire members, who might be expected to be less tolerant of the alleged crime, without an age-neutral reason. While age is not immutable in the same way that race is, remaining the same throughout a person's life, it is clearly immutable at any particular point in time in which a person may be reporting for jury duty, and one's

age at such a time certainly results from an "accident of birth." *Georgia v. McCollum*, 112 S.Ct. at 2359. Therefore, if *Batson* were extended to gender-based strikes under intermediate scrutiny, age-discrimination would invite further extension.

One commentator advocates that *United States v. DeGross, supra*, which extends the *Batson* rule to gender-based strikes, should be applied to all groups which receive heightened scrutiny in equal protection cases.[5] In so doing, he argues that peremptory challenges would not be made unavailable by suggesting that such factors as personality, responsiveness, being a leader or follower, inattentiveness, inability to comprehend issues in a complicated case, or other reasons would still be available.[6] The flaws in that argument are apparent. First, many of the reasons he says are still available could easily be declared a sham to justify an otherwise impermissible strike. Secondly, the very fact that any reason is required shows that the strike is no longer peremptory. Peremptory challenges, by definition, are not subject to the requirement of an explanation. "The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control." *Swain v. Alabama*, 380 U.S. 202, 220 (1965).

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[5] Dave Harbeck, Comment, *Eliminating Unconstitutional Juries: Applying United States v. DeGross to All Heightened Scrutiny Equal Protection Groups in the Exercise of Peremptory Challenges*, 77 Minn.L.Rev. 689 (1993).

[6] *Id.* at 715-718.

This Court has noted the importance of the position in this country's trial procedures of the peremptory challenge. *Holland v. Illinois*, 493 U.S. 474, 484 (1990). An extension of the *Batson* rule beyond the realm of racial strikes would effectively "cripple the device of peremptory challenge." *Id.* By requiring a party to be able to articulate one of the acceptable reasons with regard to his or her peremptory strikes effectively makes them non-peremptory, simply creating a level of "cause" which does not reach the level of "for cause."

In the present case race was not an issue, and there is no indication in the record how many persons in the jury venire were members of a racial minority. In addition, the venire in this case was unusually disproportionate with regard to men and women.[7] Many counties in Alabama have non-white populations accounting for thirty to seventy percent of the total.[8] Thus, it is common for a venire to be somewhat equally divided between whites and non-whites as well as between men and women.

In Alabama statistical evidence, while by no means conclusive, is highly significant in establishing a prima facie case of discrimination.

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[7] J.E.B. raised no objection pursuant to the Sixth Amendment that the venire from which the jury was chosen in this case failed to represent a fair cross-section of the community. *See Taylor v. Louisiana*, 419 U.S. 522 (1975).

[8] *Alabama County Data Book 1992-93*, published by the Alabama Department of Economic and Community Affairs, State of Alabama.

See Harrell v. State, 555 So.2d 263 (Ala. 1989). *See also Ex parte Branch*, 526 So.2d 609 (Ala. 1987). If a party uses peremptory strikes to eliminate African-Americans from the jury and the resulting number of African-Americans actually sitting on the jury is a smaller percentage than was on the venire, the party issuing the strikes may be subject to being required to explain those strikes on a race-neutral basis at a *Batson* hearing. If the rule of *Batson* were extended to gender-based strikes, it is likely that the same tests for a prima facie case would be applied. This would inevitably result in subclasses of non-white women and non-white men, which could be subject to further subdivision, depending on the racial makeup of the individual non-white venirepersons.

Moreover, the Alabama Supreme Court has recently taken the position that the safeguards which apply to minority races under *Batson, Edmonson v. Leesville Concrete Company, and Georgia v. McCollum* also apply to whites. *See White Consolidated Industries, Inc. v. American Liberty Insurance Company*, 617 So.2d 657 (Ala. 1993). Therefore, extending *Batson* to gender-based strikes would create an additional two subclasses, made up of white women and white men. Hypothetically, if a jury venire of forty persons happened to be composed of nine black men, ten black women, thirteen white men, and eight white women, a party exercising strikes against members of any of the subclasses which failed to result in a twelve person jury consisting of three black men, three black women, four white men, and two white

women, could find himself in a position of having to justify those strikes on a race-neutral and gender-neutral basis. While the reasons would not have to rise to the level of "for cause," still it is clear that an explanation could be required, eliminating the peremptory nature of the strikes.

The case of *United States v. DeGross, supra*, in which the Ninth Circuit applied the *Batson* rule to both the defendant's strikes against men and the prosecutor's strikes against women, is illustrative of one of the very real and practical problems involved in such an application. In *DeGross*, when the female defendant exercised a peremptory challenge against a male, the prosecutor objected that the defendant was removing male venirepersons in violation of their equal protection rights. The defendant had previously struck seven males. When *DeGross* could not justify her challenge on gender-neutral grounds, the court disallowed that challenge.

Later during jury selection, when there were ten women and two men seated in the jury box and six women and one man remaining in the venire, the defendant objected to the prosecutor's peremptory challenge of a Hispanic woman. When required to justify the challenge, the prosecutor said that his main reason for the challenge was to achieve "a more representative community of men and women on the jury." *DeGross*, 960 F.2d at 1436. The court accepted the explanation and allowed the strike.

The defendant was convicted, and appealed. On appeal the Ninth Circuit held that the gender-based strike of the defendant was properly disallowed, but reversed and remanded the case, holding that the government's challenge of a woman in order to keep "a more representative community of men and women" was, itself, a gender-based challenge, and should have been disallowed.

The method of choosing the jury in the Ninth Circuit is not clear from the opinion. Therefore, it is not clear whether the prosecutor could simply have declined to challenge anyone. However, in a struck jury system such as is used in Alabama, it is necessary for the litigants to strike alternately until twelve people remain, who then constitute the jury. See Rule 47, Alabama Rules of Civil Procedure. Thus, in a fact situation such as existed in *DeGross*, if the *DeGross* rule were applied and the prosecutor had no gender-neutral reason for striking any of the remaining venirepersons, the prosecutor would be caught in a Catch 22. If he struck a female the strike would not be allowed for lack of a gender-neutral reason, so he must strike the sole remaining male, thus assisting the defendant in removing males from the jury.[9]

The absence of published studies indicating

[9] It is obvious that striking a male in order to avoid a challenge based on gender constitutes a gender-based strike. However, in the fact situation presented, there is very little likelihood that the defendant would object to it.

problems among the courts in states applying the rules of *Batson* and its progeny to gender-based jury strikes does not prove that there are no problems. Alabama courts have wholeheartedly adopted the mandates of *Batson*, *Edmonson v. Leesville Concrete Company*, *Powers v. Ohio*, and *Georgia v. McCollum* as they apply to race. *See, e.g., Bush v. State*, 615 So.2d 137 (Ala.Cr.App. 1992). However, the mandates of those cases continue to raise practical problems in courts attempting to apply them during the course of litigation. More than forty cases raising issues relating to the use of peremptory jury strikes were considered and addressed by the appellate courts of Alabama during 1992. Applying the race-based jury strike rules to questions of gender would multiply the problems exponentially, slowing down litigation at every level of the proceedings.

According to the Division of Statistical Analysis in the Center for Health Statistics, Alabama Department of Public Health, there were 62,226 births in Alabama in 1992. Of this number 20,263, or approximately 32.6 percent of the total, were out-of-wedlock births. 1992 was the sixteenth consecutive year that a new record was set in Alabama with regard to out-of-wedlock births as a percentage of the total number of births. During 1992, Alabama's Title IV-D program was successful in establishing slightly over 8,000 paternities. In addition to the paternities established through the state's Title IV-D program, a small number of paternities are established each year through private court actions. Even so, the number of

children for whom paternity needs to be established and support obtained is constantly increasing.

Presently the vast majority of paternities established in Alabama are by agreement of the parties. Many more are disposed of at the juvenile or district court level after a non-excluding blood test is obtained. Up to now only a relatively small percentage of total cases have been brought to the circuit court for a jury trial. However, if the rule sought by the petitioner were to be imposed, the prospect of a jury trial would be very appealing to a defendant contesting paternity. At the very least, the trial itself could be expected to take much longer than previously. The voir dire of prospective jurors would take longer than at present, having to be detailed enough for both parties to be prepared to justify each of their jury strikes. In addition, it could be anticipated that a hearing would be required in practically every paternity case in which the chosen jury did not reflect the racial *and* gender makeup of the original venire in order for the litigants to articulate the reasons for their strikes. It is foreseeable that many of these cases would result in appeals questioning whether a prima facie case had been made for discrimination or whether the articulated reasons for the peremptory strikes were acceptable. The result of this process would be the increase of paternity cases in both the circuit courts and the appellate courts, slowing down and hindering the effectiveness of the state's efforts to establish paternity and secure support for its children, even if the state were ultimately successful in a given

case.[10]

While the Respondent has cited statistics only as they relate to paternity actions, a similar result could be expected with regard to certain criminal actions, such as rape. While this Court in *Batson*, 476 U.S. at 99, rejected Kentucky's suggestion that its holding would create serious administrative difficulties, the Respondent submits that *any* difficulties created by Batson would be greatly compounded by the imposition of the additional requirements sought by the petitioner. Such an imposition is not required in this case, since no violation of J.E.B.'s Fourteenth Amendment rights has been shown. The principles of *Batson* should not be extended as requested by the petitioner.

III. IF THIS COURT SHOULD DECIDE TO EXTEND THE BATSON RULE TO ENCOMPASS GENDER-BASED STRIKES, SUCH A RULING SHOULD HAVE PURELY PROSPECTIVE APPLICATION.

[10] The complaint for paternity and child support filed in the present case was signed by T.B. on October 20, 1989. A judgment of paternity and a support order were issued by the district court on October 22, 1990. (C.R. 18.) However, by filing a supersedeas bond with his appeal to circuit court for a trial de novo (C.R. 1) and again with his appeal to the Court of Civil Appeals (C.R. 64), J.E.B. has successfully avoided paying any support for his now four-year-old child, who was only five months old when the action began.

In *Griffith v. Kentucky*, 479 U.S. 314 (1987), which raised the question whether the *Batson* rule applied retroactively, this Court held that a new rule for the conduct of criminal prosecutions was to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a "clear break" with the past. *Griffith*, 479 U.S. at 328. However, at that time this Court noted that the area of civil litigation continued to be governed by *Chevron Oil Company v. Huson*, 404 U.S. 97 (1971).

Recently, in *Harper v. Virginia Department of Taxation*, 113 S.Ct. 2510 (1993), this Court discarded the rules set out in *Chevron Oil Company v. Huson* regarding whether or not a rule in a civil case would be applied retroactively. *See also James B. Beam Distilling Company v. Georgia*, 111 S.Ct. 2439 (1991). *Harper* held that "this Court's application of a rule of federal law to the parties before the Court requires every court to give retroactive effect to that decision." *Harper*, 113 S.Ct. at 2513. *Harper* appears to leave open the possibility that this Court might still consider giving purely prospective effect to a decision, declining to apply it either to the parties before the Court or to any other case as to conduct or events occurring before that decision. *See James B. Beam Distilling Company v. Georgia*, 111 S.Ct at 2443. *See also Northern Pipeline Construction Company v. Marathon Pipe Line Company*, 458 U.S. 50, 87 (1982).

Harper does not discuss purely prospective application of a decision, nor give any guidance as to when such application might be appropriate. In fact, as pointed out by Justice O'Connor in her dissent, the opinion contains language intimating that pure prospectivity, as well as selective prospectivity, may be barred by that decision. *Harper*, 113 S.Ct. at 2527 (O'Connor, J., dissenting).

If the possibility of pure prospective application of a decision in a civil case has not been foreclosed, such application should be adopted in the present case if this Court holds that the rules set out in Batson requiring race-neutral reasons for peremptory strikes should also apply to require gender-neutral reasons for such strikes. Such a ruling would clearly be a new principle of law which these Alabama litigants could not have foreseen,[11] since both the Alabama appellate courts and the 11th Circuit Court of Appeals have declined to so extend *Batson*, and this Court has consistently denied certiorari when petitions in such cases were filed. *See United States v. Dennis, supra; Murphy v. State, supra; Fisher v. State, supra; Daniels v. State, supra.*

Moreover, if such a decision were grounded

[11] It is again noted that the Defendant in this case, as well as the Plaintiff, exercised almost all of his peremptory strikes against venirepersons of one gender. If the state's attorney had assisted the Defendant in his endeavor to eliminate women by exercising more of its strikes against them, it is very unlikely that the case would be before this Court.

upon the historical discrimination against women which has existed in this country, application of the rule in this case would not further the goal of eliminating such discrimination, since the petitioner in this case alleges discrimination against men, not against women. Only J.E.B. could profit by an application of such a rule to require a retrial in this case, while T.B. and her child would continue to be deprived of support from the child's father.

Finally, it is clear that applying such a rule other than purely prospectively would produce substantial inequitable results. As previously pointed out, this action was filed in October 1989, when T.B.'s child was only five months old. The child passed his fourth birthday in May 1993, but he is still not receiving support from the man whom the evidence showed overwhelmingly to be the child's father. A blood test entered into evidence showed the cumulative probability that J.E.B. was the child's father to be 99.92 percent. (C.R. 9.) J.E.B. admitted having engaged in an intimate relationship with T.B. beginning in February 1988 (R.T. 153-154), which culminated in a five-day long residence with T.B. at the Econo-Lodge during the second week of August 1988, ending on August 14 of that year. T.B. gave uncontradicted testimony that no contraception was used during that week in August, which was within the period of possible conception of the child in question. (R.T. 50.) She further testified that she did not have sexual relations with anyone but J.E.B. from February 1988 until after the birth of the child in May 1989.

(R.T. 57.) J.E.B. acknowledged taking T.B. to the doctor in September 1988, when her pregnancy was confirmed. (R.T. 166.) Clearly, to apply a rule requiring a retrial in the present case, causing T.B. and her child to continue to do without support, would produce substantial inequitable and unjust results.

The foregoing discussion of prospective application of the decision is based upon the factors for consideration set out in *Chevron Oil v. Huson, supra. See also Northern Pipeline Construction Company, supra* (applying pure prospectivity). As pointed out above, to give this case pure prospective application may be completely barred by *Harper v. Virginia Department of Taxation, supra.* However, if this Court should decide to extend *Batson* to apply its rule to gender-based strikes and if *Harper* has left open the possibility of purely prospective application of such decision, then clearly a rule extending *Batson* in this case should have such application.

CONCLUSION

The foregoing argument and authorities show that J.E.B.'s rights under the Equal Protection Clause of the Fourteenth Amendment have not been violated. The rule of *Batson v. Kentucky* should not be extended to gender-based peremptory jury challenges, and the decision below should be affirmed. However, if this Court should decide in favor of extending the *Batson* rule to gender-based strikes, such decision should be given purely prospective application in order to protect the child involved in this case and other children in like circumstance.

RESPECTFULLY SUBMITTED,

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In The

Supreme Court of the United States

October Term, 1993

J.E.B.,

Petitioner,

v.

T.B.,

Respondent.

On Writ Of Certiorari
To The Supreme Court
Of The State Of Alabama

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ARGUMENT I

THE USE OF GENDER-BASED PEREMPTORY JURY STRIKES VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The state rests its justification for supporting the use of gender-based peremptory jury strikes upon the premise that gender discrimination is inherently less important than racial discrimination. (Resp. Br. at 9). There is no basis within the framework of this Court's interpretation of the Fourteenth Amendment for such a conclusion. As discussed in Petitioner's opening Brief on the Merits, gender discrimination has no place within the court system. The principles of *Batson v. Kentucky*, 476 U.S. 79 (1986), apply equally to racial and gender classifications since they share many of the same characteristics: (1) race and gender are immutable characteristics that are readily identifiable and can not be changed; (2) both characteristics have historically been used as a basis for discriminatory treatment in the jury system because of their membership in an identifiable group; and (3) both classifications have been used in the past to restrict representation in the political process.[1]

The State also offers the argument that the extensive history of discrimination against women within the jury system is somehow irrelevant to the use of discriminatory

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[1] Despite the State's argument to the contrary, *Batson* did not turn upon the strict scrutiny afforded racial classifications. In any event, this Court has yet to "decide whether classifications based upon gender are inherently suspect." *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 n.9 (1982).

peremptory strikes against males.[2] The State's narrow view of this *gender* discrimination case should be rejected. As a matter of law, even though the Petitioner in this case challenged the use of peremptory strikes against males rather than against females, it is the *gender classification* which is subject to heightened scrutiny. *Mississippi Univ. for Women v. Hogan*, 458 U.S. at 723; *see also Caban v. Mohammed*, 441 U.S. 380, 394 (1979); *Orr v. Orr*, 440 U.S. 268, 279 (1979). Moreover, when males or females are stricken based solely upon their gender, the striking litigant necessarily perpetuates stereotypes of both groups. In fact, the State's position emphasizes how gender stereotypes are mutually reinforcing.[3] The State invokes remarkable stereotypes about *both* men and women in offering a defense to gender-based peremptory strikes in this case. The State argues that there is a "reasonable perception" that men are more "sympathetic and receptive to arguments of a man" while women are "more sympathetic and receptive to complaining witnesses who bore the child." (Resp. Br. at 10-11). The State's attempt to support these perceptions with certain "studies" does not

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[2] The State specifically argues that the "[a]pplication of the rule to the present case will not further the interest of overcoming historic discrimination against women, since the Petitioner in this case alleges discrimination against men." (Resp. Br. at 6, 24).

[3] See note, *Beyond Batson: Eliminating Gender Based Peremptory Challenges*, 105 Harv. L. Rev. 1920, 1938 (1992): ("[S]tereotypes of male and female characteristics tend to be binary and hence mutually reinforcing. Thus, women are implicated when a state actor stereotypes a perspective male juror as 'hard-boiled,' and male jurors are affected in a similar way when female jurors are presumed to be 'emotional' ".)

make them any less stereotypes or over-broad generalizations. The use of gender as a proxy for individual characteristics rests on stereotypes in the same way that the use of race as a proxy did in *Batson*. It is the individual "qualifications and ability" of a potential juror to serve in a particular case which must govern that juror's selection or rejection by the litigants, not some presumption about how men or women as a group may be predisposed to think or react to a particular situation. *Batson v. Kentucky*, 476 U.S. at 79, 81. The Alabama Supreme Court, in dealing with the implementation of *Batson*, has condemned the stereotyping commonly engaged in by trial counsel when "[t]he record is sparse on any attempt to ascertain the struck juror's *individual bias* in [a] particular case." (emphasis added) *Ex parte Branch*, 526 So. 2d 609, 626 (Ala. 1987).[4] In promoting its position, the State falls prey to perpetuating the very stereotypes the Equal Protection Clause prohibits.[5]

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[4] Justice Maddox of the Alabama Supreme Court has summarized the impact of *Batson* on jury trials by stating that "one of the basic foundation stones of the *Batson* decision [is] the right of citizens to serve on a jury and not be excluded for a reason unrelated to the case to be tried. Compliance with *Batson* was intended to ensure public confidence in the integrity of the jury system". He went on to further pose that "*Batson* turned the traditional method of striking jurors based on stereotypes completely on its ear." (emphases added) Justice Hugh Maddox, *Batson: From an Appellate Judges Viewpoint*, The Alabama Lawyer, No. 5 (September 1993).

[5] The State seeks to limit Petitioner's right to exercise his equal protection rights by questioning Petitioner's peremptory challenge of women jurors. Such argument is not well taken. Petitioner recognizes that the principles of nondiscrimination apply equally to *both* adversaries in a judicial proceeding.

ARGUMENT II

THE STATE HAS FAILED TO SHOW THAT ITS PROFFERED STATE INTEREST IS FURTHERED BY THE DISCRIMINATORY USE OF GENDER-BASE PEREMPTORY STRIKES.

The State concedes that gender-based distinctions can only be upheld if the proponent of the discriminatory action can prove that such action is substantially related to a sufficiently important governmental interest. *Mississippi Univ. for Women v. Hogan*, 458 U.S. at 723 (1982); *Craig v. Boren*, 429 U.S. 190 (1976). The State offers as its substantial state interest supporting discriminatory, gender-based peremptory jury strikes the establishment of the paternity of children born to unwed mothers. However, the State has made no attempt to show that this proferred interest will be at all furthered by allowing discriminatory gender-based peremptory strikes.

The State's purported justification for gender discrimination in the use of its peremptory jury strikes could only apply to a very narrow subset of cases in Alabama. The issue of peremptory strikes based upon gender is much broader than paternity cases. The interest of the government in *every* proceeding before the Judicial Branch of government is to see that the proceedings are carried out in a fair, impartial and nondiscriminatory manner. Purposeful discrimination in the selection of a

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However, Petitioner's use of peremptory strikes, whether discriminatory or not, is irrelevant to the issues put before this Court. The State failed to object or to challenge Petitioner's use of his peremptory strikes prior to the jury being empaneled and sworn, and thus waived any such objection.

jury "harms the excluded jurors and the community at large." *Powers v. Ohio*, 111 S.Ct. 1364, 1368 (1991) (citations omitted). In *Georgia v. McCollum*, 112 S. Ct. 2348 (1992) the Court offered the opinion that "if a court allows jurors to be excluded because of group bias, it is a willing participant in a scheme that could only undermine the very foundation of our system of justice – our citizens' confidence in it". (112 S. Ct. 2354). Likewise, in *Edmondson v. Leesville Concrete Co.*, 111 S. Ct. 2077 (1991) this Court stated that "[b]y enforcing a discriminatory peremptory challenge, the court has elected to place its power, property and prestige behind the alleged discrimination". *Id.* at 2085 (citations omitted). Therefore, the interest of the State of Alabama in every case is not supported by the use of gender-based peremptory challenges, but is, in fact, harmed by such discriminatory practice.

The State attempts to inject into this case an irrelevant factor to defeat the equal protection rights of both men and women, that being the purported historical discrimination against illegitimate children and their mothers. (Resp. Br. at 12). In doing so, the State attempts to pit the protection afforded to the gender-based peremptory challenges against this historical discrimination against illegitimate children. This argument improperly assumes that the interests between these two groups are adverse. In fact, the selection of an impartial jury, – one chosen without resort to gender discrimination – is fully consistent with the State's purported interest in establishing paternity through a fair trial.

Finally, the State's entire argument in trying to support gender-based peremptory strikes falls of its own

weight because it provides as a defense to gender discrimination "the very stereotype the law condemns." *Powers v. Ohio*, 111 S. Ct. at 1370 (1991). The State argues that gender-based peremptory strikes are acceptable because it has been "shown" that men are more "sympathetic and receptive to the arguments of a man" while women are "more sympathetic and receptive to the complaining witness who bore the child." (Resp. Br. at 10-11). Despite the State's reliance upon the "reasonable perceptions" of jurors, gender is simply irrelevant to whether a person is qualified to serve on a particular jury. Like racial classifications, the characteristic of gender is irrelevant to jury service as a matter of law. Like racial classifications, gender is not a good proxy for determining the "extremes of partiality," as suggested by the State.

Even if gender were a good predictor in this particular type of case, and certainly it is not, there is no basis for concluding that gender is a predictor of juror bias in all cases. Prohibiting gender-based peremptory strikes will not interfere with the traditional right of litigants to strike jurors they have an articulated non-discriminatory basis for believing to be truly biased, but who may not be excused for cause. The *Batson* principles simply eliminate gender as a proxy for presuming bias. Gender-based strikes thus lack a "direct, substantial relationship" to the State's claimed interest since the discriminatory strikes perpetuate the "application of traditional, and often inaccurate, assumptions about the proper roles of men and women." *Mississippi Univ. for Women*, 458 U.S. at 725-26 (citations omitted).

ARGUMENT III

ANY ADDITIONAL ADMINISTRATIVE BURDEN LEVIED UPON THE JUDICIAL SYSTEM BY THE EXTENSION OF *BATSON* TO GENDER-BASED PEREMPTORY CHALLENGES CAN BE ABSORBED BY THE SAME PROCESS NOW BEING APPLIED BY THE COURTS TO RACE-BASED CHALLENGES.

The State of Alabama takes the position that allowing litigants to challenge gender-based peremptory jury strikes would impose an undue burden upon the judicial system, "slowing down litigation at every level of the proceedings." (Resp. Br. at 19). To take this position, one must first concede, as the State appears to do,[6] that the use of gender-based peremptory jury strikes violates the Equal Protection Clause, and then take the further position that such violation of the constitutional rights of the litigant and the excluded jurors is justified because of the administrative inconvenience which might be caused by correcting the situation. Such position has been thoroughly rejected by this Court. Despite the adverse impact upon government functions, this Court has repeatedly "rejected administrative ease and convenience as sufficiently important objectives to justify gender-based classifications." *Craig v. Boren*, 429 U.S. at 198; *see also Frontiero v. Richardson*, 411 U.S. 677, 690 (1973). Indeed, *Batson* itself rejected arguments based upon administrative inconvenience. *Batson*, 476 U.S. at 99.

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[6] The State concedes that J.E.B is entitled to have the heightened scrutiny test applied to his challenge of gender-based peremptory jury strikes. (Resp. Br. at 12).

Even assuming that there is some "administrative inconvenience" caused by an extension of the *Batson* principles, Federal and State Courts have developed considerable experience with applying these principles in the context of race. Justice Maddox, in a special concurring opinion in *Huntley v. State*, No. 1910530. 1992 Ala. LEXIS 1178 (Ala. Sept. 18, 1992) (corrected March 10, 1993; second correction May 21, 1993) set out several suggestions for eliminating many of the "Batson-generated problems.[7] The State also ignores the fact that the Ninth Circuit and

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[7] "(1) Requiring prospective jurors, when they are summoned to appear or when they assemble, to fill out a written questionnaire that would provide substantial background information to the parties to use in exercising their peremptory strikes. In addition to a general questionnaire, the parties might have specific questions, because of the particular nature of the case to be tried, that they would want prospective jurors to answer.

"(2) Limiting the number of peremptory strikes available by limiting the size of the venire from which the parties begin striking. In a majority of civil and criminal cases, the rules of procedure only require 24 qualified jurors to be on the panel when the parties begin to exercise their peremptory challenges.

"(3) Adopting the rule used in Federal courts that prohibits so-called 'back striking; that is, placing 12 qualified prospective jurors in the jury box, and having the parties decide how many of those 12 they separately and severally want to strike. If a prospective juror was not removed from the box by either side that juror could not be removed later."

Huntley v. State, 1993 Ala. LEXIS 1178, at 18 (footnote omitted).

many states have afforded the protection against gender-based peremptory strikes. There is no evidence that this protection has led to the demise of the peremptory challenge or would pose unworkable administrative difficulties. Indeed, the United States – a major litigator – supports this protection against gender-based peremptory strikes.

While the State predicts that there will be difficulties in determining what constitutes a *prima facie* case or determining what constitutes a violation of this constitutional principle, these are matters that appropriately should be left in the first instance to the discretion of the trial court. In Alabama, the Supreme Court has articulated at least nine factors that are relevant to this inquiry. *See Harrell v. State*, 555 So. 2d 263, 266-67 (Ala. 1989); *Ex parte Branch*, 526 So. 2d 609, 622-23 (Ala. 1987). There is no reason to believe that the prohibition of gender-based strikes would require a modification of such an inquiry. Even if a modification becomes necessary, there is no reason to believe that the federal and state trial courts can not adapt such modifications to the trial process.

The State further asserts that Alabama's particular "struck jury" method of choosing juries would somehow complicate the application of *Batson* to gender-based peremptory strikes. In the first place, the State's choice of jury selection methods can not insulate it from the strictures of the Equal Protection Clause. Secondly, Alabama courts have consistently demonstrated the ability to develop *Batson* procedures in the context of this very type of jury selection method. See *Harrell v. State*, 555 So. 2d 263; *Ex parte Branch*, 526 So. 2d 609. Finally, the fact that the numbers of men and women on a jury venire are

approximately equal will not preclude the development of *Batson* procedures. Alabama Courts, for example, are already dealing with this issue in the context of race. The State recognizes that in "[m]any counties" in Alabama it is common for a "venire to be somewhat equally divided between whites and non-whites." (Resp. Br. at 15). In summary, the State's administrative concerns are overstated and, indeed, irrelevant to the threshold question of whether the Equal Protection Clause applies to gender-based peremptory strikes.

ARGUMENT IV

THE EXTENSION OF *BATSON* PRINCIPLES TO GENDER-BASED PEREMPTORY CHALLENGES SHOULD APPLY RETROACTIVELY.

Should this Court determine that gender-based peremptory jury strikes violate the constitutional rights of litigants and jurors, the State's brief argues such holding should then be applied only prospectively, thereby ignoring the State's violation of the Equal Protection Clause in this case. There is no justification for such an application. Neither *Batson*, nor *Powers v. Ohio*, nor *Edmondson v. Leesville Concrete*, nor *Georgia v. McCullum*, were applied purely prospectively. Moreover, this Court held in *Griffith v. Kentucky*, 479 U.S. 314, 320-328 (1987), that the decision in *Batson* would be applied retroactively.

As the state readily points out, the case of *Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510 (1993), could be read as precluding pure prospectivity. Although the Court did not explicitly say so, *Harper* drew heavily on *Griffith v. Kentucky* as support for retroactivity in that case. The ruling in *Griffith*, Justice Thomas noted, rested on "two 'basic norms of constitutional adjudication.' " *Id.*

at 2516 (citation omitted). The first of these norms was that " 'the nature of judicial review' strips [the Court] of the quintessentially 'legislat[ive]' prerogative to make rules of law retroactive or prospective as we see fit." *Id.* The second was that " 'selective application of new rules violates the principle of treating similarly situated [parties] the same.' " *Id.* Those principles equally apply here.

Still, this Court need not reach the issue of whether pure prospectivity is *ever* appropriate. In this case, retroactivity is warranted. *Griffith v. Kentucky* held that *Batson* was to be applied retroactively. The holding was broader than the *Batson* issue – the Court concluded that *all* "newly declared . . . rule[s]" must be applied retroactively to every criminal case "pending on direct review." *Griffith*, 479 U.S. at 322; *Harper*, 113 S. Ct. at 2516. Since the extension of *Batson* to gender would apply to both criminal and civil cases, lower courts would be required under *Griffith* to apply the extension in criminal cases. It would be anomalous not to also apply it retroactively in civil cases. (Not to mention the problems that would arise in quasi-criminal or quasi-civil cases).

In supporting its plea for prospective application, the State asserts that the extension of *Batson* to gender-based strikes could not have been foreseen by the parties to this litigation. Such is certainly not the case. The judicial momentum for extending the *Batson* principles to gender-based peremptory challenges has been building ever since the *Batson* decision was originally handed down. During the same term as *Batson* the Court handed down its opinion in *Lockhart v. McCree*, 476 U.S. 162 (1986) in which it stated that "the exclusion from jury service of large groups of individuals not on the basis of their inability to serve as jurors, but on the basis of some

immutable characteristic such as race, *gender*, or ethnic background, undeniably gives rise to an 'appearance of unfairness.' " (emphasis added) *Id.* at 175. At the time of the trial of this cause, the United States District Court for the Ninth Circuit had already determined that the Equal Protection Clause prohibited gender-based peremptory jury strikes. *United States v. DeGross*, 960 F.2d 1433 (9th Cir. 1992), *aff'g* 913 F.2d 1417 (9th Cir. 1990). Further, three justices of the Alabama Supreme Court filed a dissenting opinion in *Ex parte Murphy*, 596 So. 2d 45 (Ala 1992), *cert. denied*, 113 S. Ct. 86 (1992), urging the Alabama Supreme Court to adopt the position of the Ninth Circuit Court of Appeals. This dissent by Justice Maddox followed his earlier dissent in *Ex parte Fisher*, 587 So. 2d 1039 (Ala. 1991), *cert. denied*, 112 S. Ct. 1486 (1992) handed down on September 13, 1991, more than thirty days prior to the trial in this case, in which he stated that Petitioner's claim that the prosecutor used his peremptory strikes to exclude women from the jury had merit such that he would have granted the Petition for Certiorari. Thus, the State has been on notice that this issue was one in which Petitioner's claims of discrimination would be subject to review by the appellate courts.

The State attempts to further support its plea for prospective application of the extension of *Batson* to gender-based peremptory challenges by alluding to the purported plight of the mother and child involved in this case. However, as is so readily pointed out by the State, the petitioner has filed a supersedeas bond in the lower court to secure the payment of all child support payments which may become due during the pendency of these proceedings.

Therefore, the State has shown no justification for making the extension of the *Batson* principles to gender-based peremptory strikes prospective only. Upon remand, this Court may order the trial court to conduct a hearing based upon the same or similar principles applicable to objections to race-based peremptory challenges.

CONCLUSION

Gender-based peremptory jury challenges are discriminatory and as such violate the Equal Protection Clause of the Fourteenth Amendment. Despite the State's claim that an extension of *Batson* to gender-based jury strikes will result in administrative difficulties for the court system, such need for administrative convenience will not support the discriminatory use of peremptory challenges. The State's proffered interest in establishing paternity is not well supported and can not be used as the basis for denying Petitioner the equal protection of the law. Gender discrimination in the selection of a jury, like racial discrimination, has no place within the judicial system. The decision below should therefore be reversed and remanded with such instructions as the Court deems appropriate.

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No. 92-1239

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

J. E. B.,

Petitioner,

v.

T. B.,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

SUPPLEMENTAL BRIEF OF RESPONDENT

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

SUPPLEMENT TO ARGUMENT

In Respondent's Brief on the Merits, Page 18, the Respondent mentioned that in the struck jury system used in Alabama it is necessary for the litigants to use their strikes alternately until the proper number of people remain to constitute the jury. Since the filing of that brief the Respondent has discovered an as yet unpublished opinion from the Court of Criminal Appeals of Alabama: *Pettway v. State*, __ So 2d __ (Ala.Cr.App. 1993) [CR-91-842, March 5, 1993] (1993 WL 56272 (Ala.Cr.App.)); *cert. denied, Ex parte Pettway*, __ So. 2d __ (Ala. 1993) [1921251, August 20, 1993] (1993 WL 314881 (Ala.)).

This case, in which a prosecutor surrendered the state's last three peremptory strikes to the court, illustrates one problem which may result when the prosecutor exhausts the strikes for which he can articulate a reason before the jury has reached a proper size. This problem would be compounded if the

litigants had to be prepared to articulate gender-neutral, as well as race-neutral reasons for strikes in the event that the court found a prima facie case of discrimination in the exercise of the strikes.

For the convenience of the Court copies of *Pettiway v. State* have been lodged with the Clerk of the Court.

RESPECTFULLY SUBMITTED,

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In the Supreme Court of the United States

OCTOBER TERM, 1993

SUPREME COURT, U.S.
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J. E. B., PETITIONER

v.

T. B.

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF ALABAMA

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QUESTION PRESENTED

Whether the Constitution prohibits the exercise of a peremptory challenge on the basis of a juror's gender.

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T. B.

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF ALABAMA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question whether the Constitution bars the exercise of a peremptory challenge on the basis of a juror's gender. The Court's resolution of that issue will govern jury selection in future federal prosecutions. The government therefore has a significant interest in this case.

STATEMENT

On behalf of T. B., the mother of a minor child, the State of Alabama filed a complaint for paternity and child support against petitioner in the District Court of Jackson County, Alabama. Pet. App. A22-A23. Paternity actions in Alabama are tried before a jury.

In preparation for jury selection, the district judge assembled a panel of 36 potential jurors. *Id.* at A5. Twelve of those jurors were male; 24 were female. *Id.* at A15. After the court excused three jurors for cause, a panel of 33 jurors remained, of whom 10 were male. The State used nine of its 10 peremptory strikes to remove male jurors; petitioner used one of his 11 strikes to remove a male juror. *Id.* at A15-A16. As a result, all of the selected jurors were female. *Id.* at A16.

Before the jury was empaneled, petitioner objected to the State's peremptory challenges on the ground that they were exercised against male jurors on the basis of gender. Petitioner argued that gender-based peremptory challenges are invalid under *Batson* v. *Kentucky*, 476 U.S. 79 (1986). Pet. App. A2-A3. The court rejected that claim and empaneled an all-female jury. *Id.* at A3-A5. The jury found petitioner to be the father, and the court entered an order directing him to pay child support. *Id.* at A24. On post-trial motion, the court reaffirmed its ruling that *Batson* does not extend to gender-based peremptory challenges. *Id.* at A16.

The Alabama Court of Civil Appeals affirmed. Pet. App. A22-A30. Relying on Alabama precedent,[1] the court held that *Batson* does not extend to gender-based peremptory challenges. *Id.* at A24-A25. The Alabama Supreme Court denied certiorari. *Id.* at A33.

[1] See *Murphy* v. *State*, 596 So. 2d 42 (Ala. Crim. App. 1991), writ denied, 596 So. 2d 45 (Ala.), cert. denied, 113 S. Ct. 86 (1992); *Fisher* v. *State*, 587 So. 2d 1027 (Ala. Crim. App.), writ denied, 587 So. 2d 1039 (Ala. 1991), cert. denied, 112 S. Ct. 1486 (1992); *Daniels* v. *State*, 581 So. 2d 536 (Ala. Crim. App. 1990), writ denied, 581 So. 2d 541 (Ala.), cert. denied, 112 S. Ct. 315 (1991); *Dysart* v. *State*, 581 So. 2d 541 (Ala. Crim. App.), writ denied, 581 So. 2d 545 (Ala. 1991).

SUMMARY OF ARGUMENT

In *Batson* v. *Kentucky*, 476 U.S. 79 (1986), the Court held that it violates the Equal Protection Clause for a prosecutor to exercise a peremptory challenge on the basis of a juror's race. The same equal protection principles compel the conclusion that gender-based peremptory challenges are unconstitutional.

A. As a matter of common law and legislative policy, women were barred from state and federal jury service throughout the 19th century, and for longer in many States. For most of this nation's history, the legislative policies that prevented or discouraged the participation of women on juries were deemed compatible with the Constitution. In *Taylor* v. *Louisiana*, 419 U.S. 522 (1975), however, this Court ruled that differential exemption policies that result in the exclusion of women from jury service violate the Sixth Amendment.

Taylor is consistent with the modern constitutional tenet that gender-based classifications warrant heightened scrutiny under the Equal Protection Clause. That doctrine reflects the fact that outmoded assumptions about the proper roles of men and women have no relevance to their actual abilities and qualifications. Accordingly, when government draws distinctions based on gender, it must justify them with something more than archaic stereotypes.

B. The rule announced in *Batson* governed race-based peremptory challenges, but it rested on equal protection principles that are equally applicable to challenges based on gender. *Batson* was designed not

only to protect the rights of criminal defendants, but also to protect jurors against invidious discrimination and the community as a whole from biased jury selection procedures that cast doubt on the fairness of the judicial system.

Gender discrimination in the exercise of peremptory challenges harms the excluded juror by denying him or her the opportunity for jury service for a reason that is unacceptable as a basis for government action. A statute barring women as jurors in a particular kind of case based on the notion that women characteristically think, feel, and act differently from men would plainly be unconstitutional. Under *Batson* and its progeny, a party's use of peremptory challenges to strike jurors on that basis is constitutionally invalid for the same reasons.

In addition, gender discrimination in peremptory challenges harms the community at large. If gender may be used as a proxy for beliefs and attitudes in the courtroom, the judicial system will be seen as giving credence to stereotypical views about the propensities of men and women. Moreover, gender discrimination impairs public confidence in the fairness of the judicial system. If litigants can seek, and in some cases attain, single-sex juries in the hopes of skewing the outcome of cases implicating gender issues, the judicial system is harmed by the appearance of bias.

C. The extension of *Batson* to gender will not eliminate the benefit attributed to the peremptory challenge: the enhanced appearance to the parties that the jury is composed of persons who are fair.

First, because gender does not reliably predict a juror's vote, barring gender-based challenges does

not deprive litigants of a valuable means of eliminating subtly biased jurors. A litigant may believe that male or female jurors will be biased in a particular case and would feel more comfortable with a jury that excludes them, but such personal prejudices cannot override equal protection requirements.

Second, the extension of *Batson* to gender does not suggest that all group-based peremptory challenges are unconstitutional. Gender distinctions are subject to heightened equal protection scrutiny; most groups, affiliations, and classes that might form the basis of a peremptory challenge, however, are not accorded heightened review. As to those groups, rational basis review applies, and the legitimate government interest, served by the peremptory challenge, of assuring the parties that the jury is impartial suffices to overcome the juror's equal protection interests.

Finally, the procedures that *Batson* applied to race-based challenges are also suitable for gender-based challenges. Many courts have already banned gender-based peremptories from jury selection. Experience in those jurisdictions does not suggest that a rule prohibiting gender-based strikes is unworkable.

ARGUMENT

GENDER-BASED PEREMPTORY CHALLENGES VIOLATE THE EQUAL PROTECTION CLAUSE

Peremptory challenges based on a juror's gender raise equal protection concerns similar to those raised by peremptory challenges based on a juror's race. Like race-based challenges, gender-based challenges cannot be justified as a legitimate means for obtaining a jury that is perceived to be impartial. In light of the principles of *Batson* v. *Kentucky*, 476 U.S. 79 (1986), the rights of individual jurors, and the need for the judicial system to maintain nondiscriminatory standards in jury selection, the Court should hold that gender-based peremptory challenges are unconstitutional.

A. Gender Discrimination In Jury Selection Implicates Heightened Equal Protection Concerns

1. For many years, gender discrimination was de jure in this nation's jury system. Under English common law, "women were excluded from juries based on the doctrine of *propter defectum sexus*, literally, the 'defect of sex.' " *United States* v. *De Gross*, 960 F.2d 1433, 1438 (9th Cir. 1992) (en banc), quoting 3 William Blackstone, *Commentaries* *362. In this country, until the end of the 19th century, women were universally disqualified from jury service by state law. *Taylor* v. *Louisiana*, 419 U.S. 522, 533 n.13 (1975); Grace Taylor, Note, *Jury Service for Women*, 12 U. Fla. L. Rev. 224 (1959). In some States, the prohibition continued well into this century. See *Carter* v. *Jury Comm'n*, 396 U.S. 320, 323 n.2 (1970) (until 1966, only men were eligible for jury service in Alabama); *Duren* v. *Missouri*, 439

U.S. 357, 359 n.4 (1979).[2] So well entrenched was the exclusion of women from juries at the time of *Strauder* v. *West Virginia*, 100 U.S. 303 (1880), that this Court, while finding that the exclusion of black men from juries violated the Fourteenth Amendment, expressed no doubt that a State "may confine the selection [of jurors] to males." *Id.* at 310; see also *Fay* v. *New York*, 332 U.S. 261, 289-290 (1947).

By the mid-20th century, the Court recognized that the exclusion of women from juries raised issues of fairness. In *Ballard* v. *United States*, 329 U.S. 187 (1946), the Court relied on its supervisory powers over the federal courts in holding that women could not be excluded from the venire in federal trials. The Court explained, *id.* at 193-194:

> It is said, however, that an all male panel drawn from the various groups within a community will be as truly representative as if women were included. The thought is that the factors which tend to influence the action of women are the same as those which influence the action of men—personality, background, economic status—and not sex. Yet it is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act as a class. But, if the shoe were on the other foot, who would claim that a jury was

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[2] "The first state to permit women jurors was Washington, and it did not do so until 1911. In 1942 only 28 states permitted women to serve on juries and they were still disqualified in the other 20. Moreover, in 15 of the 28 states which permitted women to serve, they might claim exemption because of their sex." *Fay* v. *New York*, 332 U.S. 261, 289 (1947).

> truly representative of the community if all men were intentionally and systematically excluded from the panel? The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded.

Despite the views stated in *Ballard*, the Court in *Hoyt* v. *Florida*, 368 U.S. 57 (1961), upheld a Florida law that permitted women to be included on jury lists only if they volunteered for jury service, while requiring men to apply for an exemption. The Court held that the differential exemption policies based on sex were reasonable in light of the role of women "as the center of home and family life." *Id.* at 62.

Fourteen years later, the Court repudiated the reasoning of *Hoyt*. In *Taylor* v. *Louisiana*, *supra*, the Court struck down a state statute nearly identical to that in *Hoyt* under the fair-cross-section requirement of the Sixth Amendment. The Court determined that restricting jury service to women who had volunteered could not be supported by the view that women have a distinctive role in maintaining "family life." 419 U.S. at 534 & n.13.[3] See also *Duren* v. *Missouri*, *supra* (invalidating, under the Sixth

[3] Although *Taylor* distinguished *Hoyt* by noting that it had "not involve[d] a defendant's Sixth Amendment right to a jury drawn from a fair cross section of the community," 419 U.S. at 534, the Court has since recognized that *Taylor* "in effect" overruled *Hoyt*. *Payne* v. *Tennessee*, 111 S. Ct. 2597, 2610 n.1 (1991).

Amendment, the State's grant of an automatic exemption from jury service to any woman requesting it).

2. In requiring the inclusion of women in the venire, *Taylor* relied on Sixth Amendment principles, but the opinion's approach accords with the view that gender-based classifications are subject to heightened equal protection scrutiny. In *Reed* v. *Reed*, 404 U.S. 71 (1971), the Court broke new ground under the Equal Protection Clause by invalidating a statutory preference for male over female estate administrators. In the years following *Reed*, the Court made clear that traditional views about the place of women in society do not provide a permissible basis for government action on the basis of gender. The Court struck down a statute establishing a presumption that women are dependent on their spouses, *Frontiero* v. *Richardson*, 411 U.S. 677 (1973); a statute providing that women reach majority at an earlier age than men, *Stanton* v. *Stanton*, 421 U.S. 7 (1975); and a law requiring men to be 21, but women only 18, to purchase 3.2% beer, *Craig* v. *Boren*, 429 U.S. 190 (1976).

In each case, the Court rejected governmental policies resting on "archaic and overbroad" generalizations about gender, or on "outdated misconceptions concerning the role of females in the home rather than in the marketplace and world of ideas." *Craig*, 429 U.S. at 198. See also *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432, 441 (1985) (differential treatment of the sexes "very likely reflect[s] outmoded notions of the relative capabilities of men and women"); *Caban* v. *Mohammed*, 441 U.S. 380, 398 (1979) (Stewart, J., dissenting) (gender classi-

fications "may reflect or operate to perpetuate mythical or stereotyped assumptions about the proper roles and the relative capabilities of men and women that are unrelated to any inherent differences between the sexes"). As this Court stated in *Planned Parenthood of Southeastern Penn.* v. *Casey*, 112 S. Ct. 2791, 2831 (1992):

> Only one generation has passed since this Court observed that "woman is still regarded as the center of home and family life," with attendant "special responsibilities" that precluded full and independent legal status under the Constitution. *Hoyt* v. *Florida*, * * *. These views, of course, are no longer consistent with our understanding of the family, the individual, or the Constitution.

Because of the possibility that stereotypical assumptions are at work, the Court requires a showing under equal protection principles that a gender-based law "serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Mississippi University for Women* v. *Hogan*, 458 U.S. 718, 724 (1982) (Fourteenth Amendment); *Davis* v. *Passman*, 442 U.S. 228, 234-235 (1979) (Fifth Amendment). Gender-based stereotypes that assume that one gender suffers from "an inherent handicap" or is "innately inferior" are an illegitimate basis for government action. *Hogan*, 458 U.S. at 725. That a state practice "discriminates against males rather than against females does not exempt it from scrutiny or reduce the standard of review." *Hogan*, 458 U.S. at 723; *Orr* v. *Orr*, 440 U.S. 268, 279 (1979); *Craig* v. *Boren*, *supra*.

B. The Rationale Of *Batson* v. *Kentucky* Is Applicable To Gender Discrimination

1. The Court's decision in *Batson* v. *Kentucky*, 476 U.S. 79 (1986), established the unconstitutionality of a prosecutor's use of peremptory challenges to exclude jurors on the basis of race. *Batson* overruled *Swain* v. *Alabama*, 380 U.S. 202 (1965), to the extent that *Swain* had barred a defendant from raising an equal protection challenge to the racially discriminatory use of peremptory challenges in a particular case. 476 U.S. at 100 n.25; *Powers* v. *Ohio*, 111 S. Ct. 1364, 1368 (1991). *Batson's* holding "was designed to serve multiple ends," *Allen* v. *Hardy*, 478 U.S. 255, 259 (1986) (per curiam) (internal quotation marks omitted), only one of which was the protection of the constitutional rights of criminal defendants. *Batson*, 476 U.S. at 86-88.

First, *Batson* found that the exclusion of a juror on racial grounds violates the juror's constitutional rights. "[B]y denying a person participation in jury service on account of his race, the State unconstitutionally discriminate[s] against the excluded juror." 476 U.S. at 87. Second, the Court concluded that the community itself is harmed by racial discrimination in jury selection. "Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice," *ibid.*, and reinforce prejudices grounded in race, *id.* at 88.

Since *Batson*, the Court has made clear that in all contexts, the Constitution prohibits peremptory challenges used to eliminate jurors on the basis of race. In *Powers* v. *Ohio*, *supra*, the Court held that the defendant need not be of the same race as the ex-

cluded juror in order to raise a *Batson* objection. *Powers* rejected a requirement of racial correlation between the defendant and the excluded juror, because such a "limitation on a defendant's right to object conforms neither with our accepted rules of standing to raise a constitutional claim nor with the substantive guarantees of the Equal Protection Clause and the policies underlying federal statutory law." 111 S. Ct. at 1368. The Court noted that "[a]n individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race." *Id.* at 1370.

In *Edmonson* v. *Leesville Concrete Co.*, 111 S. Ct. 2077 (1991), the Court extended *Batson* to civil cases, holding that civil litigants are state actors when exercising peremptory challenges and are therefore prohibited from excluding jurors on grounds of race. And in *Georgia* v. *McCollum*, 112 S. Ct. 2348 (1992), the Court ruled that *Batson* applies to peremptory challenges exercised by criminal defendants. The Court explained that "the extension of *Batson* in this context is designed to remedy the harm done to the 'dignity of persons' and to the 'integrity of the courts.'" *Id.* at 2353, quoting *Powers*, 111 S. Ct. at 1366.

Powers, *Edmonson*, and *McCollum* establish that, under *Batson*, the use of a peremptory challenge to exclude a juror "on account of race violates a prospective juror's equal protection rights." *Edmonson*, 111 S. Ct. at 2087; *Powers*, 111 S. Ct. at 1370; *McCollum*, 112 S. Ct. at 2353-2357. By subjecting the peremptory challenge to conventional equal protection requirements—a position that the Court had previously

rejected in *Swain* v. *Alabama*, 380 U.S. at 221-222—*Batson* and its progeny invoke constitutional principles that apply equally to gender-based challenges.

2. Gender-based peremptory challenges, like race-based challenges, are incompatible with equal protection principles. "Classifications based upon gender, not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination." *Personnel Administrator* v. *Feeney*, 422 U.S. 256, 273 (1979). In exercising peremptory challenges parties draw on authority delegated by the government to select the jury. *McCollum*, 112 S. Ct. at 2354-2356; *Edmonson*, 111 S. Ct. at 2082-2087. Just as race-based peremptory challenges often rely on stereotypical assumptions that are unacceptable in a court of law, gender-based peremptory challenges often rely on stereotypical views about the attitudes and capabilities of men and women. Those views are illegitimate grounds for government action.

The use of gender-based peremptories inflicts the same harms that the Court identified in *Batson*. First, striking a juror solely on grounds of sex "harms the excluded juror." *Powers*, 111 S. Ct. at 1368; *Batson*, 476 U.S. at 87. As this Court has noted, "competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial." *Batson*, 476 U.S. at 87. Strikes based on sex, however, often reflect "gender stereotypes," such as the view that women are "generally governed by emotion, instinct, and feeling rather than reason, judgment, or common sense." *State* v. *Burch*, 830 P.2d 357, 366 (Wash. Ct. App. 1992) (rejecting prosecutor's explanation that a "full-time mother"

would be unduly sympathetic). The indulgence of such views may lead to a preference for men in some cases, see *United States* v. *Wilson*, 867 F.2d 486, 488 (8th Cir.) (prosecutor wanted male jurors for case involving street crime, because "fear factor * * * might prevent [a] female juror from voting for a verdict of guilty"), cert. denied, 493 U.S. 827 (1989); *United States* v. *Hoelscher*, 914 F.2d 1527, 1540 (8th Cir. 1990) (prosecutor wanted male jurors for narcotics case), cert. denied, 498 U.S. 1090 (1991); *Fisher* v. *State*, 587 So. 2d 1027 (Ala. Crim. App.) (prosecutor wanted male jurors for capital case), writ denied, 587 So. 2d 1039 (Ala. 1991), cert. denied, 112 S. Ct. 1486 (1992), while suggesting a preference for women in others, see *State* v. *Adams*, 533 So. 2d 1060, 1063 (La. Ct. App. 1988) (Plotkin, J., dissenting) ("The State admits that it excluded all men from the petit jury because they would tend to 'trivialize' the female defendant's sex crime * * *."), cert. denied, 540 So. 2d 338 (La. 1989).[4]

The rationales often expressed for gender-based strikes call to mind the view expressed in some cases from the prior century that "[t]he natural and proper timidity and delicacy which belongs to the female

[4] A manual formerly used to instruct Dallas, Texas, prosecutors provided the following advice: "I don't like women jurors because I can't trust them. They do, however, make the best jurors in cases involving crimes against children. It is possible that their 'women's intuition' can help you if you can't win your case with the facts." Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. Chi. L. Rev. 153, 210 (1989); see also *id.* at 182 & n.112 (collecting excerpts from jury-selection practice manuals revealing their authors' "unabashed misogyny").

sex evidently unfits it for many of the occupations of civil life," which are reserved for men because of "that decision and firmness which are presumed to predominate in the sterner sex." *Bradwell* v. *Illinois*, 83 U.S. (16 Wall.) 130, 141-142 (1873) (concurring opinion. See also *In re Goodell*, 39 Wis. 232, 245 (1875) (endorsing statutory ineligibility of women for membership in the bar, because "[t]he peculiar qualities of womanhood, its gentle graces, its quick sensibility, its tender susceptibility, its purity, its delicacy, its emotional impulses, its subordination of hard reason to sympathetic feeling, are surely not qualifications for forensic strife").[5] Under modern equal protection jurisprudence, when legislatures treat men and women differently based on such archaic notions, it violates the Constitution. The

[5] Similar views were advanced in support of the statutory disqualification of women from jury service. See *Bailey* v. *State*, 219 S.W.2d 424, 428 (Ark. 1949) ("Criminal court trials often involve testimony of the foulest kind, and they sometimes require consideration of indecent conduct, the use of filthy and loathsome words, references to intimate sex relationships, and other elements that would prove humiliating, embarrassing and degrading to a lady."); *State* v. *Hall*, 187 So. 2d 861, 863 (Miss.) ("The legislature has the right to exclude women so they may continue their service as mothers, wives, and homemakers, and also to protect them * * * from the filth, obscenity, and noxious atmosphere that so often pervades a courtroom during a jury trial."), appeal dismissed, 385 U.S. 98 (1966). Those justifications are plainly invalid to support statutory restrictions on the opportunity of women for jury service, and they are equally invalid to support gender-based peremptory challenges in individual cases. "A State may not draw up its jury lists pursuant to neutral procedures, but then resort to discrimination at 'other stages in the selection process.'" *Powers*, 111 S. Ct. at 1369, quoting *Batson*, 476 U.S. at 88.

same is true when litigants wield government power through the peremptory challenge in the service of anachronistic images of men and women. A State could not lawfully disqualify women from certain kinds of cases or men from others based on assumptions about their respective propensities; under *Batson* and its progeny, the State cannot permit the parties in a lawsuit to strike jurors based on the same assumptions.

Second, not only the excluded juror, but the "community at large" suffers harm from the use of gender-based challenges. *Powers*, 111 S. Ct. at 1368; *Batson*, 476 U.S. at 87. The use of peremptory challenges to restrict or eliminate one gender's participation in jury service threatens to undermine public confidence in the judicial system. Particularly when gender-related issues are prominent in a particular case, the discriminatory use of peremptory challenges may create an impression that the judicial system has acquiesced in suppressing full participation by one gender. If gender-based peremptories could be freely employed, a prosecutor could overtly attempt to eliminate all male jurors in a rape case. A corporate defendant could seek to eliminate all female jurors in a sexual harassment case. Or the State could eliminate all male jurors in a paternity case. To permit challenges to be used in that fashion appears to condone the use of gender-based stereotypes within a government institution.

Moreover, the skewing of jury panels through gender-based challenges subverts the public's perception that courts and juries are fair. Regardless of whether a panel's impartiality is actually diminished by gender-based challenges, cf. *Holland* v. *Illinois*, 493 U.S. 474 (1990), the empaneling of single-sex juries through the discriminatory use of peremptory challenges can create the appearance of bias. Citizens are likely to lack confidence in a verdict rendered by a jury chosen by discriminatory standards that would be unlawful in any other governmental institution. If a court allows jurors to be excluded on grounds reflecting racial or sexual bias, "it is a willing participant in a scheme that could only undermine the very foundation of our system of justice—our citizens' confidence in it." *Georgia* v. *McCollum*, 112 S. Ct. at 1254.[6]

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[6] Several federal and state courts have barred gender-based peremptory challenges. See *United States* v. *De Gross*, 960 F.2d 1433, 1437-1439 (9th Cir. 1992) (en banc); *State* v. *Burch*, 830 P.2d 357 (Wash. Ct. App. 1992) (relying on state and federal constitutions); *Di Donato* v. *Santini*, 283 Cal. Rptr. 751 (Ct. App. 1991) (same), review denied (Cal. Oct. 2, 1991); *Tyler* v. *State*, 623 A.2d 648 (Md. 1993) (relying on state constitution); *People* v. *Mitchell*, 593 N.E.2d 882, 888-889 (Ill. App. 1992) (same), aff'd in part and vacated in relevant part, No. 73812 (Ill. May 20, 1993); *State* v. *Gonzales*, 808 P.2d 40, 42 (N.M. App.), cert. denied, 806 P.2d 65 (N.M. 1991) (same); *State* v. *Levinson*, 795 P.2d 845, 849 (Haw. 1990) (same); *People* v. *Irizarry*, 560 N.Y.S.2d 279 (App. Div. 1990) (same); *Commonwealth* v. *Hutchinson*, 481 N.E.2d 188, 190 (Mass. 1985) (same). But see *United States* v. *Broussard*, 987 F.2d 215, 218-220 (5th Cir. 1993); *United States* v. *Nichols*, 937 F.2d 1257, 1263 (7th Cir. 1991), cert. denied, 112 S. Ct. 989 (1992); *United States* v. *Hamilton*, 850 F.2d 1038, 1041-1042 (4th Cir. 1988), cert. dismissed, 489 U.S. 1094 (1989), and cert. denied, 493 U.S. 1069 (1990); *State* v. *Culver*, 444 N.W.2d 662 (Neb. 1989); *State* v. *Clay*, 779 S.W.2d 673, 676 (Mo. Ct. App. 1989); *State* v. *Adams*, 533 So. 2d 1060, 1063 (La. Ct. App. 1988), cert. denied, 540 So. 2d 338 (La. 1989); *State* v. *Oliviera*, 534 A.2d 867, 870

3. Theorizing that gender-based strikes are less common than the widespread use of strikes against blacks that prompted this Court's decision in *Batson*, 476 U.S. at 99; *id.* at 101 (White, J., concurring), one court of appeals has suggested that the *Swain* evidentiary formulation should continue to govern gender-based challenges. See *United States* v. *Broussard*, 987 F.2d 215, 218-220 (5th Cir. 1993). That position is unsound.

First, the *Swain* approach is no more feasible as a method for proving gender discrimination in the use of peremptory challenges than it is for proving race discrimination. As the Court observed in *Batson*, there are insuperable "practical difficulties" to tracking peremptory challenges across many cases, particularly when many jurisdictions do not record or preserve the names of jurors and the process of voir

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(R.I. 1987); Alabama cases cited at note 1, *supra* (all refusing to apply *Batson* to gender).

Many commentators have also argued in favor of extending *Batson* to gender. See Dave Harbeck, Comment, *Eliminating Unconstitutional Juries*, 77 Minn. L. Rev. 689 (1993); John S. Lapham, Note, *Gender-Based Peremptory Challenges*, 43 J. Urb. & Contemp. L. 465 (1993); Note, *Beyond* Batson: *Eliminating Gender-Based Peremptory Challenges*, 105 Harv. L. Rev. 1920 (1992); Robert L. Harris, Jr., Note, *Redefining the Harm of Peremptory Challenges*, 32 William & Mary L. Rev. 1027, 1052-1055 (1991); Steven M. Puiszis, Edmonson *v.* Leesville Concrete Co.: *Will the Peremptory Challenge Survive Its Battle with the Equal Protection Clause?*, 25 J. Marshall L. Rev. 37, 52 (1991); Frederick T. Kelsey, Note, *Gender Based Peremptory Challenges and the New York State Constitution*, 8 Touro L. Rev. 91, 117 (1991); Albert W. Alschuler, *supra*, 56 U. Chi. L. Rev. at 180-182; Shirley S. Sagawa, Batson *v.* Kentucky: *Will It Keep Women on the Jury?*, 3 Berkeley Women's L.J. 14 (1988).

dire. 476 U.S. at 92 n.17. Moreover, if discriminatory strikes of defendants and civil litigants, as well as prosecutors, are to be taken into account, the process would be infinitely more complicated. To remit parties to *Swain* is to condemn any claim of discrimination to failure.

Second, *Batson* declares that "[a] single invidiously discriminatory governmental act is not immunized by the absence of such discrimination in the making of other comparable decisions." 476 U.S. at 95; see also *Davis* v. *Passman*, 442 U.S. at 235 & n.10 (federal right "to be free from gender discrimination" "is personal; it is [the individual], after all, who must suffer the effects of such discrimination"). If it is impermissible for parties to use gender as a basis for exercising peremptory challenges, there is no justification for requiring "several [to] suffer discrimination" before anyone can establish a claim. *Batson*, 476 U.S. at 96, quoting *McCray* v. *New York*, 461 U.S. 961, 965 (1983) (Marshall, J., dissenting from the denial of certiorari).

In this respect, *Batson* disavowed the central premise of *Swain*. Under *Swain*, a prosecutor could legitimately strike an individual juror on the basis of race, or on an assumption of partiality based on race, in order to further the aim of "using the State's challenges to obtain a fair and impartial jury to try the case before the court." [7] 380 U.S. at 222. A constitu-

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[7] *Swain* accepted that the challenge is frequently exercised "on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty. For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be." 380 U.S. at 220-221.

tional problem might develop, *Swain* suggested, only if the prosecutor systematically struck blacks "for reasons wholly unrelated to the outcome of the particular case on trial," for that would support the inference that "the peremptory system is being used to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population." *Id.* at 224.

Batson, however, rejected the view that race is a legitimate basis for a strike in any case. Under *Batson*, a prosecutor may not justify a challenge "by stating merely that he challenged jurors of the defendant's race on the assumption—or his intuitive judgment—that they would be partial to the defendant because of their shared race." [8] 476 U.S. at 97. To resurrect *Swain* for gender-based challenges would therefore imply that it is permissible to remove jurors on the basis of gender, as long as there are "trial-related" reasons for doing so in a particular case. Equal protection principles forbid such invidious action on the basis of gender—particularly in cases that may pose the greatest temptation to succumb to gender stereotypes.

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[8] The dissenters in *Batson* clearly identified the departure from *Swain*. See 476 U.S. at 134, 135 (Rehnquist, J., joined by Burger, C.J., dissenting) ("[T]he Court also overrules one of the fundamental substantive holdings of *Swain*, namely, that the State may use its peremptory challenges to remove from the jury, on a case-specific basis, prospective jurors of the same race as the defendant. * * * [In *Swain*,] the Court held that the State's use of peremptory challenges to exclude blacks from a particular jury based on the assumption or belief that they would be more likely to favor a black defendant does not violate equal protection.").

C. The Extension Of *Batson* To Gender Will Not Frustrate The Utility Of The Peremptory Challenge

1. A ruling that litigants may not strike potential jurors solely because of gender does not conflict with a State's "legitimate interest" in allowing peremptory challenges: "the assurance of impartiality that the system of peremptory challenges has traditionally provided." *Holland* v. *Illinois*, 493 U.S. at 483; *Swain* v. *Alabama*, 380 U.S. at 219 (purpose of the peremptory challenge is to further "the rule that to perform its high function in the best way justice must satisfy the appearance of justice"). A requirement of gender neutrality in the exercise of peremptory challenges does not prevent parties from removing jurors who they reasonably believe to be truly biased, but who were not excused for cause; it simply eliminates gender as a proxy for presuming bias.[9]

Depriving a party of the right to strike jurors based on gender in no way impairs the party's ability to obtain an impartial jury. Most studies have found that gender is not a good predictor of a juror's vote.[10]

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[9] What a ban on gender-based strikes prohibits is basing the strike on gender alone. It is quite different, however, for a party to exercise a peremptory challenge based on a characteristic of a person that may be disproportionately associated with one gender, but that the party believes has a bearing on juror performance. For example, challenging all persons who have had military service would disproportionately affect men, while challenging all persons employed as school teachers would disproportionately affect women. Absent a showing of pretext, however, those bases for challenges are not constitutionally suspect, since they are not gender-based. See *Hernandez* v. *New York*, 111 S. Ct. 1859 (1991).

[10] See Valerie P. Hans & Neil Vidmar, *Judging the Jury* 76 (1986) ("[I]n the majority of studies there are not significant differences in the way men and women perceive and

But even if gender were a good predictor of juror performance in some cases, the characteristics or backgrounds that are thought to make women "good" jurors for one side or "bad" jurors for another are factors that are likely to be shared by many, but not all, women, and some, but not all, men. If conducted properly, voir dire examination of the prospective jurors should provide the parties with the means to identify the underlying characteristics or background factors that are thought to make particular jurors favorable or unfavorable, without requiring the parties to rely on the proxy of gender.

Quite apart from what is learned through voir dire, a litigant may surmise that jurors of one gender would likely harbor unspoken biases and may feel more comfortable with a panel that excludes them. The desire to strike based on such subjective feelings, however, is insufficient, unless courts are to accept as a defense to gender discrimination "the very stereotype the law condemns," *Powers*, 111 S. Ct. at 1370. The peremptory challenge is not of constitutional di-

react to trials; yet a few studies find women more defense-oriented, while still others show women more favorable to the prosecutor."); Reid Hastie, Steven D. Penrod & Nancy Pennington, *Inside the Jury* 140 (1983) ("The individual difference that has received the most attention by empirical researchers is juror gender. * * * Neither student nor citizen judgments for typical criminal case materials have revealed differences between male and female verdict preferences. * * * The picture differs for rape cases, where female jurors appear to be somewhat more conviction-prone than male jurors."); 1 Francis X. Busch, *Law and Tactics in Jury Trials* § 149, at 831-832 (1959) ("In this age of general and specialized education, availed of generally by both men and women, it would appear unsound to base a peremptory challenge in any case upon the sole ground of sex.").

mension. *Frazier* v. *United States*, 335 U.S. 497, 505 n.11 (1948); *Stilson* v. *United States*, 250 U.S. 583, 586 (1919). In *Georgia* v. *McCollum*, 112 S. Ct. at 2357-2358, this Court acknowledged the value of the peremptory challenge, yet held that its benefits do not outweigh the constitutional right of jurors to be free from racial discrimination. While expressing doubt that the extension of *Batson* to criminal defendants would "undermine the contribution of the peremptory challenge to the administration of justice," *id.* at 2358, the Court declared that, even if it did, the price of tolerating race-based strikes is "too high to meet the standard of the Constitution." *Ibid.*, quoting *Edmonson*, 111 S. Ct. at 2088. The constitutional cost of tolerating gender-based exclusions is similarly too high.[11]

2. The extension of *Batson* to gender does not suggest that all group-based challenges are incompatible with equal protection principles. It is true that litigants frequently rely on group characteristics

[11] In some cases, prosecutors have struck jurors of one gender in order to achieve a more balanced panel or to assure that members of both sexes serve on the jury. See *United States* v. *De Gross*, 960 F.2d at 1443 & n.14; *United States* v. *Hamilton*, 850 F.2d at 1041. In theory, that purpose is consistent with the underlying reason for ensuring that both men and women are included in jury venires—to obtain the "subtle interplay of influence one on the other." *Taylor* v. *Louisiana*, 419 U.S. at 532, quoting *Ballard* v. *United States*, 329 U.S. at 193. It would be quite difficult, however, to administer a rule that treated some reasons for gender-based strikes differently from others. Moreover, because a defendant's challenges are also governed by the requirements of equal protection, *Georgia* v. *McCollum*, *supra*, a prosecutor should not have to engage in gender-based strikes in order to counterbalance defense efforts to skew the jury.

such as a juror's age, affiliations, marital status, occupation, or place of residence in exercising peremptory challenges. This Court, however, has never held the vast majority of group classifications that litigants may employ in exercising peremptories to be "suspect" in equal protection terms.

While classifications based on race or national origin are generally subject to strict equal protection scrutiny, and classifications based on gender and illegitimacy are judged according to an intermediate yet heightened level of review, social or economic classifications are constitutionally valid if they survive the highly deferential rational basis test. See *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432, 439-441 (1985); *Clark* v. *Jeter*, 486 U.S. 456, 461 (1988). The Court has declined to apply heightened scrutiny, for example, to groups defined by age, physical disability, or mental retardation, *Cleburne*, 473 U.S. at 440-441, 442-447, and has voiced its "reluctan[ce] to set out on [a] course" that would multiply the number of suspect classes. *Id.* at 446.

Thus, with respect to groups that are not treated as suspect or quasi-suspect classes for equal protection purposes, the Constitution requires only that the government act rationally to further a legitimate state interest in allowing the strike. *Cleburne*, 473 U.S. at 440-441. The peremptory challenge system satisfies that test. The government's interest in having the parties perceive that they are receiving a fair trial by impartial jurors is a legitimate one, and the allowance of peremptory challenges is a rational way to further that purpose. Accordingly, the peremptory challenge system is valid as applied to categories of

persons normally subject to rational basis equal protection review.[12]

3. Finally, allowing gender-based *Batson* claims will not hamstring the exercise of all challenges or unduly bog down the process of jury selection. Experience in the many jurisdictions that have barred gender-based challenges (see note 6, *supra*) does not support the view that litigants and trial courts are incapable of complying with a rule barring strikes based on gender.

As with race-based *Batson* claims, a party alleging a gender-based claim must make a prima facie showing of discrimination before the party exercising the challenge is required to explain the basis for the strike. Such a showing is not automatic. Where the case does not implicate gender-related issues or involve a grossly disproportionate number of strikes directed at one gender, courts may appropriately hesitate to draw an inference of discrimination simply from the fact that several jurors of one gender have

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[12] See *United States* v. *De Gross*, 960 F.2d at 1438 n.8 (equal protection implications of race and gender distinguish those reasons for strikes "from other factors that are not improper bases for exclusion from juries, for example, one's occupation"); Note, *supra*, 105 Harv. L. Rev. at 1928, 1935 (relying on different levels of scrutiny under the Equal Protection Clause in concluding that peremptories based on age or occupation are permissible); Dave Harbeck, Comment, *supra*, 77 Minn. L. Rev. at 714-715 & n.178 (stereotypes are permissible bases for strikes against persons who are not members of classes entitled to heightened scrutiny; for example, a prosecutor may exclude a professor on the belief that "all professors are willing to give criminals a second chance").

been struck. Cf. *Powers* v. *Ohio*, 111 S. Ct. at 1373-1374 (noting that factors bearing on whether there is a prima facie case may vary according to whether there is reason in a particular case to be concerned about the possible discriminatory use of strikes). And when an explanation is required, it does not have to rise to the level of a "for cause" challenge; it simply must be based on a juror characteristic other than gender (or other protected characteristic). See *Hernandez* v. *New York*, 111 S. Ct. 1859, 1866-1868 (1991) (plurality opinion) (discussing requirements for race neutrality under *Batson*).

Although some have speculated that an extension of *Batson* to gender would work a "practical frustration" of the challenge by imposing an onerous requirement of explanation for every strike, see *United States* v. *Broussard*, 987 F.2d at 219, that concern is overstated. The same fears were raised by the State in *Batson* itself. The Court, however, determined that its holding "enforces the mandate of equal protection and furthers the ends of justice" in eliminating race-based strikes, and that trial courts are competent to implement the *Batson* procedures. 476 U.S. at 99. There is no reason to draw a different conclusion with respect to gender.

CONCLUSION

The judgment of the Court of Civil Appeals of Alabama should be reversed.

Respectfully submitted.

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QUESTION PRESENTED

Whether the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution prohibits the exercise of peremptory challenges based upon the gender of the juror?

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INTEREST OF THE *AMICI CURIAE*

Amici Curiae are 17 women's rights, civil rights and civil liberties organizations sharing a strong commitment to the protection of the rights of women and the elimination of unlawful discrimination against women.[1] They litigate and educate the public to secure equal rights for women in all aspects of American life. Individual statements of interest of the *amici* are reproduced in the Appendix.

The case before the Court is of great importance to *amici* because the use of gender-based peremptory challenges undermines the right to participate equally in the legal system without regard to gender, reinforces stereotypical views of gender roles and perpetuates historic discrimination against women. *Amici* submit this brief in support of petitioner J.E.B. on the issue of whether the exercise of gender-based peremptory challenges violates the Equal Protection Clause of the Fourteenth Amendment.

STATEMENT OF THE CASE

This case involves a paternity and child support action initiated by the State of Alabama against J.E.B. in the Circuit Court of Jackson County, Alabama. The State alleged, on behalf of T.B., that J.E.B. was the father of a child born to T.B.

The matter was called for trial on October 21, 1991 and the court proceeded to empanel a jury. During *voir dire*, the State used nine of its ten peremptory challenges to strike men.[2] Prior to the empaneling of the jury, petitioner challenged the State's use of its peremptory strikes to eliminate male jurors from the panel based upon their gender.[3] Petitioner requested the trial court to hold a hearing on the State's use of peremptories pursuant to the procedures established in *Batson v. Kentucky*, 476 U.S. 79 (1986). Petition at A-2-5. The trial court overruled the objection and the case proceeded to trial with twelve female jurors. *Id.* Since the trial court denied petitioner's challenge of the State's peremptory strikes without requiring the State to provide gender-neutral reasons, there is no issue before this Court as to whether or not the State actually discriminated in its use of peremptory strikes.

The jury returned a verdict finding J.E.B. to be the father of the child, and the trial court entered judgment. Petitioner filed a post-judgment motion requesting a judgment notwithstanding the verdict or, in the alternative, a new trial. Petitioner again raised his argument that the State's gender-based peremptory challenges violate federal equal protection guarantees and urged the court to afford him the procedures under *Batson*. Petition at A-7-8. The trial court denied the motion, concluding "that the *Batson* doctrine does not extend to gender based strikes." Petition at A-14-16.

Petitioner thereafter noticed an appeal to the Alabama Court of Civil Appeals, which rejected his equal protection argument on the ground that the Alabama Su-

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[1] Petitioner and respondent have consented to the filing of this brief. Copies of the parties' consent letters have been filed with the Clerk.

[2] Alabama uses the "struck jury" method to impanel juries in civil cases. Jurors and alternates are selected by each party, commencing with the party demanding the jury, alternately striking names off a list of at least twenty-four potential jurors, until twelve remain on the list. Alternates are the last jurors struck before the requisite number of jurors is reached. *See* Ala. R. Civ. P. 47.

[3] This paternity action is a civil suit under Alabama law. Ala. Code § 26-17-9 (1992). Under Ala. Code § 26-17-7 (1992), however, the State of Alabama is given jurisdiction to initiate such actions on behalf of the mother of the child. Consequently, the State's district attorney exercised the peremptory challenges in this case. The constitutional issue posed by this case would be no different, however, had the peremptory challenges been exercised by a private civil litigant. *See Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2083-87 (1991) (holding that the exercise of peremptory strikes by private litigants in civil cases constitutes "state action").

preme Court had "declined to extend the *Batson* principle to gender-based strikes." Petition at A-26; *J.E.B. v. State*, 606 So. 2d 156, 157 (Ala. Ct. App. 1992). The Alabama Supreme Court denied certiorari on October 23, 1992. Petition at A-33. Petitioner filed a petition for writ of certiorari in this Court, which granted the petition. 61 U.S.L.W. 3771 (May 18, 1993).

SUMMARY OF ARGUMENT

Gender discrimination in jury selection has no place in the courts. Although this Court chose to grant certiorari in a case involving peremptory strikes against men, this case necessarily implicates the rights of women as well. Peremptory strikes against either gender based upon the characteristic of gender sustain stereotypical views of both genders. Such stereotypes perpetuate the historical discrimination that women have suffered in the jury system.

The exercise of gender-based peremptory challenges undermines the ability of women to fully attain the equal rights long denied them in jury service. Such discrimination also harms the interests of women as a group and as individuals, and undermines public confidence in the judicial system's ability to dispense justice.

Since gender-based peremptory challenges rely on gender stereotypes, they are not related to the objective of achieving an impartial jury or to any other legitimate government objective. Accordingly, such challenges cannot withstand the heightened scrutiny against which gender classifications must be tested under the Equal Protection Clause. *See, e.g., Craig v. Boren*, 429 U.S. 190, 199 (1976). The principles of *Batson* and its progeny are therefore fully applicable to the exercise of gender-based challenges.

ARGUMENT

I. GENDER-BASED PEREMPTORY CHALLENGES ARE BASED ON STEREOTYPES OF WOMEN AND HARM WOMEN BY PERPETUATING HISTORICAL DISCRIMINATION AGAINST THEM.

Gender discrimination flows from policies and actions based upon an individual's sex rather than the qualities or accomplishments of the individual. Victims of discrimination in the arena of government (and elsewhere) for too long, women should not be relegated to mere observers of our system of justice simply because they are women. As demonstrated below, the use of peremptory challenges based upon gender perpetuates a history of exclusion, and results in distinct and substantial injuries to women as a group, to women as individuals, to litigants, and to society as a whole.

A. Gender-Based Peremptory Challenges Perpetuate the Historical Discrimination Suffered by Women.

The use of gender-based peremptory strikes was not an issue until modern times since only men were allowed to serve on juries. The exclusion of women from juries dates back to English common law, under which women were denied the right to jury service based on the doctrine of *propter defectum sexus*—because of the defect of sex.[4] In 1880, this Court invalidated a state statute banning African-Americans from jury service, but nonetheless indicated its approval of all-male juries. *See Strauder v. West Virginia*, 100 U.S. 303, 310 (1880) (Fourteenth Amendment does not prohibit state from confining selection "to males, to freeholders, to citizens, to persons within

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[4] 3 W. Blackstone, *Commentaries on the Laws of England* 362 (1979). A jury composed of women, however, was sometimes used in cases where it was necessary to determine whether or not a woman was pregnant. *See id.*; R. Justin Miller, *The Woman Juror*, 2 Or. L. Rev. 30 (1922).

certain ages, or to persons having educational qualifications."), *overruled,* 419 U.S. 522 (1975).[5]

The historical exclusion of women from juries rested on culturally-embedded views of gender differences. It was assumed that a woman's special sphere was the home, and that jury duty would interfere with a woman's ability to fulfill her domestic role. It was also believed that women had traits that were different from men's, and that women operated under different—sometimes higher—moral codes.[6] Opponents of women's jury service also argued that the presumed "different nature" of women would adversely affect their ability to dispense justice.[7] These opponents raised the concern that women did not have the worldly experience necessary to serve on juries, especially in cases involving commercial issues. Implicit

[5] Despite *Strauder,* some states authorized the participation of women on juries near the end of the 19th century. For example, Utah permitted women to serve on juries beginning in 1898. Carol Weisbrod, *Images of the Woman Juror,* 9 Harv. Women's L.J. 59, 60 n.3 (1986) ("Weisbrod"), and Wyoming women were allowed to be seated on juries from 1870 until 1892. Susan McCoin, *Sex Discrimination in the Voir Dire Process: The Rights of Prospective Female Jurors,* 58 S. Cal. L. Rev. 1225, 1243 n.118 (1985) ("McCoin").

[6] Weisbrod, *supra* note 5, at 61-62. With regard to the assumptions made about women and the home, opponents of women's jury service, like the anti-suffragists, insisted that women's political participation would injure the family. The rationale was that the more women strayed from the home, the more they would adopt the male values of politics and business, to the neglect of the female values needed for the preservation of the home. Opponents contended that jury service would require women to be away from home for long periods, effectively requiring them to "abandon" their children. Furthermore, the opponents feared that indelicate language often heard in court trials might embarrass women and dilute their "purity." A woman's virtue might be further compromised, opponents argued, by staying overnight with male jurors during long trials. *Id.* at 64-67.

[7] Weisbrod, *supra* note 5, at 68.

in these arguments was the assumption that women's verdicts would not resemble justice dispensed by men, and that women's decisionmaking would be unfairly biased.[8]

In the great majority of states, women continued to be excluded from jury service, even after they attained universal suffrage in 1920.[9] During the Second World War, at the same time great numbers of women went to work in industrial occupations traditionally reserved for men, twenty-one- states still excluded women from juries.[10] And, although the Civil Rights Act of 1957 [11] gave women the right to sit on federal juries, three states continued to exclude women from juries through 1962.[12] The last state law barring women from juries was finally repealed in 1968.[13]

In *Hoyt v. Florida,* 368 U.S. 57 (1961), *overruled,* 419 U.S. 522 (1975), this Court found that a Florida statute according women an absolute exemption from jury service did not violate the Fourteenth Amendment. *Id.* at 65. Acknowledging the "enlightened emancipation of women from the restrictions and protections of bygone

[8] *Id.* at 75-76.

[9] Note, *Beyond Batson: Eliminating Gender-Based Peremptory Challenges,* 105 Harv. L. Rev. 1920, 1924 (1992) (*"Challenges"*).

[10] Weisbrod, *supra* note 5, at 60-61. This Court held in 1946 that federal courts could not keep women off jury panels if women were eligible for jury service under local law. *Ballard v. United States,* 329 U.S. 187 (1946). The decision rested not on constitutional grounds but on the Court's supervisory power over the federal courts. The *Ballard* decision did not have a significant impact on the states—in 1948, fifteen states still denied women the right to serve as jurors. Weisbrod, *supra* note 5, at 61 & n.6.

[11] Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634, 635-38 (1957) (codified as amended in scattered sections of Titles 28 and 42 of the United States Code).

[12] Weisbrod, *supra* note 5, at 61 & n.7 (Alabama, Mississippi, and South Carolina prohibited women jurors at that time).

[13] *See* McCoin, *supra* note 5, at 1243.

years, and their entry into many parts of community life formerly considered to be reserved to men," the Court nevertheless concluded that the statute was " 'based on some reasonable classification.' " *Id.* at 61-62. Specifically, the Court held that the state was "acting in pursuit of the general welfare" because women were "still regarded as the center of home and family life." *Id.* at 62.[14]

It was not until 1975 that this Court determined to "put to rest the suggestion that all women should be exempt from jury service based solely on their sex and the presumed role in the home."[15] In *Taylor v. Louisiana*, the Court held for the first time that the systematic exclusion of women from jury panels violates a defendant's Sixth Amendment rights.[16] The Court there observed that " '[w]hen any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable.' " *Taylor*, 419 U.S. at 532 n.12 (quoting *Peters v. Kiff*, 407 U.S. 493, 502-04 (1972)). However, the promise of *Taylor* has not been realized, as gender discrimination continues to find acceptance in the courtroom through the discriminatory exercise of peremptory challenges.

In fact, modern trial manuals rely on sexual stereotyping in recommending jury selection strategies.[17] These

[14] *See also Mississippi v. Hall*, 187 So. 2d 861, 863 (Miss. 1966) ("The legislature has the right to exclude women so they may continue their service as mothers, wives, and homemakers, and also to protect them . . . from the filth, obscenity, and noxious atmosphere that so often pervades a courtroom during a jury trial."), *appeal dismissed*, 385 U.S. 98 (1966).

[15] *Taylor v. Louisiana*, 419 U.S. 522, 535 n.17 (1975).

[16] *Id.* at 538; *see also Duren v. Missouri*, 439 U.S. 357, 360 (1979).

[17] William Eich, *Gender Bias in the Courtroom: Some Participants Are More Equal Than Others*, 69 Judicature 339, 340-41 (April-May 1986); McCoin, *supra* note 5, at 1244.

manuals advise trial attorneys, for example, that women are less likely to feel sympathy for an attractive woman, less likely to feel sympathy for personal injury plaintiffs since they have endured the rigors of childbirth, and less likely to reach a prompt decision. *See, e.g.*, Fred Lane, *Goldstein Trial Technique* §§ 9.45-9.47 (1984); 3 Melvin M. Belli, *Modern Trials* §§ 51.59, 51.68 (2d ed. 1982); Valerie P. Hans & Neil Vidmar, *Judging the Jury* 73 (1986). One trial manual goes so far as to suggest that:

> Housewives in the suburbs are thought to be conservative on damages and not particularly sympathetic. Working women's tendencies can be expected to be shaped by the professions in which they are engaged. Women's liberationist women may feel antagonism toward male plaintiffs or male lawyers. Such jurors may appear strident, self-assertive, or hostile. If a female juror demands to be addressed as Ms. and not Miss, you probably should take heed.

Ward Wagner, *Art of Advocacy—Jury Selection* § 1.04(9) (1990). These recent expressions underscore that stereotypes of women jurors—still very much alive—should finally be put to rest. The extension of *Batson* protections to gender-based peremptories will go far toward erasing the imprimatur of government on these prejudices.

B. Gender-Based Peremptory Challenges Harm Women, Invade the Rights of Litigants, and Harm the Justice System.

Gender stereotyping in the jury selection process, and the discrimination that results from it, harms the excluded group, undermines the public's faith in the fairness of the justice system and harms litigants. *See Ballard v. United States*, 329 U.S. at 195 (Injury from "[t]he systematic and intentional exclusion of women" from jury panels "is not limited to the defendant—there is injury to the jury

system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts."). These various injuries—discussed below—are perpetuated by a litigant's use of gender-based peremptory challenges.

Exclusion of persons based on gender from petit juries through peremptory challenges harms each member of the excluded group. For example, the exclusion of women gives life to the myth that women's contributions to civic life are unimportant, and that women should not contribute to defining morality. The exclusion of women as a group from this process sends an implicit message that women are somehow not competent to participate in this important civil function. *See Batson*, 476 U.S. at 87 ("Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial."); Robert Harris, Note, *Redefining the Harm of Peremptory Challenges*, 32 Wm. & Mary L. Rev. 1027, 1060 (1991).

Moreover, when women or men as a class are regarded as a homogenous group who all think and act the same, it becomes easy to use gender as a proxy for generalizations and stereotypes and to discount the individual qualities that each person possesses. *See United States v. De Gross*, 960 F.2d 1433, 1439 (9th Cir. 1992) ("Peremptory strikes based on gender . . . harm the excluded venireperson because discriminatory strikes are not based upon an individual's qualifications."). Reliance on stereotypes of women as a group, for example, denies to the individual that she is unique and has qualities that distinguish her from others. Thus, treatment of individual women by relying on group stereotypes denies those women feelings of individual value and self worth, and deprives the jury system of the perspectives that these excluded persons would otherwise bring to the process. *Challenges*, *supra* note 9, at 1936-37.

Further, in the absence of a prohibition against striking potential jurors because they are women or men, gender can be used as a pretext for racial discrimination.[18] While such discrimination is unlawful under *Batson* and its progeny, litigants could too easily seize the opportunity to invoke gender as an excuse for unlawful, racially motivated strikes.[19]

Thus, when peremptory challenges are used against women based on gender, people of color are vulnerable to a double risk of discrimination, based both on race and on sex, perpetrating a particularly invidious form of discrimination. *Challenges*, *supra* note 9, at 1934 n.114. People (and particularly women) of color are already among the most disadvantaged in our society. This form of double discrimination merely perpetuates and reinforces their disadvantage. Sagawa, *supra* note 18, at 34-37, 43-44.

Striking persons based on gender also undermines the public's confidence in the jury selection process, and thus invades a public interest that this Court found crucial in *Edmonson*. *See also Georgia v. McCollum*, 112 S. Ct. 2348, 2353 (1992) (The "extension of *Batson* in this context is designed to remedy the harm done to the 'dignity of persons' and to the 'integrity of the courts.' "); McCoin,

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[18] Shirley S. Sagawa, *Batson v. Kentucky: Will It Keep Women on the Jury?*, 3 Berkeley Women's L.J. 14, 43-44 (1990).

[19] A recent Maryland case prohibiting gender-based strikes under that state's Equal Rights Amendment illustrates how women of color frequently are stricken. *Tyler v. State*, 623 A.2d 648 (Md. Ct. App. 1993), *rev'g*, *Eiland v. State*, 607 A.2d 42 (Md. Ct. Spec. App. 1992). The State used 16 of its 20 peremptory challenges to strike women, and the other four to strike men. *Eleven* of the sixteen women who were challenged by the State were African-American, three were white, and one was Asian. In attempting to justify the peremptory strikes against the African-American women, the State repeatedly stated that it was not striking the jurors because they were African-American, but because they were women.

supra note 5, at 1241-42. "The purpose of the jury system is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair. The verdict will not be accepted or understood in these terms if the jury is chosen by unlawful means at the outset." *Powers v. Ohio*, 111 S. Ct. 1364, 1372 (1991). Indeed, public disrespect, doubt, and dissatisfaction are fostered when people are barred from jury service based on gender, just as when African-Americans or Latinos are barred. It is difficult to expect confidence in a verdict if the validity of the composition of the trier of fact is questionable. *See Batson*, 476 U.S. at 87 ("Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.").[20]

In this case, all men were stricken from the jury. But women too were the subject of harmful discrimination to the extent that the State, in exercising its challenges to strike men, relied on stereotypical views as to how women would respond to a paternity action. Women may thus be sought by the State for the jury in a paternity action, but it is just as certain that in other types of cases stereotyping may make women the subject of peremptory challenges. This Court should not condone a situation in which the ability of a woman or man to serve on a jury is tied to prejudicial notions held by trial attorneys as to

[20] Moreover, while this is not a criminal case, the same considerations apply with equal or even greater force in the criminal law setting. "The rehabilitative effect of condemnation and punishment by one's peers is destroyed . . . if the defendant believes she has been convicted unfairly." Sagawa, *supra* note 18, at 42. The ability of the criminal justice process to send a message to a defendant that his or her peers condemn the conduct in question is impaired when the defendant believes that the jury's verdict is based on a process lacking fundamental fairness. The criminal justice system is less effective if the validity of the results obtained through the process are perceived to be tainted by unlawful discrimination. *Id.*

how men or women will react to a particular type of case simply because of their gender. Doing so not only gives license to gender stereotyping, but undermines the public's confidence in the fairness of the jury system.

The trial below was infected from its outset by bias, sending a message to both litigants that prejudices can and do invade the courtroom. "[T]he exclusion from jury service of large groups of individuals not on the basis of their inability to serve as jurors, but on the basis of some immutable characteristic such as race, gender, or ethnic background, undeniably gives rise to an 'appearance of unfairness.'" *Lockhart v. McCree*, 476 U.S. 162, 175 (1986). Indeed, the participants in a trial cannot be expected to have faith in the fairness of jury decisions unless the law guarantees equal protection to the very jurors that are called upon to dispense justice.

II. THE USE OF PEREMPTORY CHALLENGES BASED UPON GENDER VIOLATES THE EQUAL PROTECTION CLAUSE.

A. The Principles Underlying *Batson* Apply with Full Force to the Gender Discrimination Setting.

The equal protection analysis employed by this Court in *Batson* and in subsequent cases leaves no room for the perpetuation of discriminatory peremptory challenges based upon gender. The *Batson* Court held that a prosecutor's use of race-based peremptory challenges: (1) deprives the defendant of his or her "right to be tried by a jury whose members are selected pursuant to non-discriminatory criteria," (2) "unconstitutionally discriminat[es] against the excluded juror," and (3) "undermine[s] public confidence in the fairness of our system of justice." 476 U.S. at 85-87. While the only issue before the Court was the constitutionality of race-based discrimination, nothing in the decision suggests that the holding is limited only to discrimination against the single, cognizable group

at issue in that case. Indeed, this Court has long recognized that women are also a cognizable group deserving special protections against the discriminatory treatment in the iury selection process that they have long endured. *Ballard v. United States*, 329 U.S. at 195; *Taylor*, 419 U.S. at 537; *see also Duren v. Missouri*, 439 U.S. 357 (1979).

Batson is equally applicable to racial and gender classifications since they are analogous in three ways: (1) race and gender are immutable characteristics that are readily identifiable and cannot be changed, (2) both groups have historically suffered discriminatory treatment in the jury system because of their membership in an identifiable group, and (3) both groups have been historically underrepresented in the political process.

This Court has recognized the shared characteristics of race and gender classifications. In addition to recognizing that gender, like race, is an "immutable characteristic," *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973), this Court has recognized that both African-Americans and women have historically lacked power and that both share a history of discrimination in the jury system:

> There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of "romantic paternalism" which, in practical effect, put women, not on a pedestal, but in a cage. . . . As a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children.

Id. at 684-85 (footnote omitted).[21] This Court's equal protection analysis under *Batson* applies to gender precisely because race-based and gender-based peremptories evoke a shared history of exclusion from political participation.

It thus requires no fundamental extension of constitutional analysis to apply *Batson* to discrimination against gender—and in fact it defies accepted equal protection doctrine to suggest that only discrimination against African-Americans is unlawful, while discrimination against another classification accorded a heightened level of scrutiny, gender, is not. In fact, allowing the State to exclude jurors based upon gender is tantamount to branding with the State's imprimatur the false assumption that some distinction exists between the ability of a man and a woman to serve as an impartial juror. *See United States v. De Gross*, 960 F.2d 1433, 1436-38 (9th Cir. 1992) (en banc) (holding, in the course of applying *Batson* equal protection analysis to gender-based peremptories, that "[t]he history of juries in the United States is one of pervasive, government sanctioned exclusion of women" and that "[p]ermitting gender-based peremptory challenges would simply affirm an erroneous and unconstitutional presumption that women are less qualified than men to serve as jurors"), *aff'g* 913 F.2d 1417 (9th Cir. 1990).[22]

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[21] More recently, this Court reaffirmed that "[h]istory provides numerous examples of legislative attempts to exclude women from particular areas simply because legislators believed women were less able to perform a particular function." *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 n.10 (1982).

[22] Numerous commentators have concluded that gender-based peremptory strikes violate the Equal Protection Clause. *See, e.g., Challenges, supra* note 9; Sagawa, *supra* note 18; Dave Harbeck, *Eliminating Unconstitutional Juries: Applying United States v. De Gross to All Heightened Scrutiny Equal Protection Groups in the Exercise of Peremptory Challenges*, 77 Minn. L. Rev. 689 (1993); S. Alexandria Jo, *Reconstruction of the Peremptory Challenge System: A Look at Gender-Based Peremptory Challenges*, 22 Pac. L.J. 1305 (1991); Jere W. Morehead, *Exploring the Fron-*

It would be anomalous, indeed, for this Court to permit gender discrimination to occur in the courtroom, while recognizing that gender discrimination is prohibited in other areas. As this Court observed in *Edmonson*:

> [T]he injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself. Few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds.

Edmonson, 111 S. Ct. at 2087. Similarly, this Court recently reaffirmed that "the courtroom setting in which the peremptory challenge is exercised intensifies the harmful effects of the private litigant's discriminatory act." *McCollum*, 112 S. Ct. at 2356.[23]

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tiers of Batson v. Kentucky: Should the Safeguards of Equal Protection Extend to Gender?, 14 Am. J. Trial Advoc. 289 (1990).

[23] *See also Powers v. Ohio*, 111 S. Ct. at 1373 (The Fourteenth Amendment's mandate that discrimination be eliminated "from all official acts and proceedings of the State is *most compelling in the judicial system.*") (emphasis added). Gender bias is manifested in a wide range of ways in the courtroom. Many state and federal courts have developed task forces to attempt to rectify other manifestations of gender bias. *See, e.g.*, Lynn Hecht Schafran, *Gender Bias in the Courts: An Emerging Focus for Judicial Reform*, 21 Ariz. L.J. 237 (1989). The New York Task Force on Women in the Courts, for example, noted in its report:

> The Task Force has concluded that gender bias against women litigants, attorneys and court employees is a pervasive problem with grave consequences. Women are often denied equal justice, equal treatment and equal opportunity. Cultural stereotypes of women's roles in marriage and society daily distort courts' application of substantive law. Women uniquely, disproportionately and with unacceptable frequency, must endure a climate of condescension, indifference and hostility. Whether as attorneys or court employees, women are too often denied equal opportunities to realize their potential.

The New York Task Force on Women in the Courts (1986).

This Court's post-*Batson* rulings have held that the *Batson* doctrine is not limited to cases involving discrimination against African-Americans. In *Hernandez v. New York*, 111 S. Ct. 1859, 1864 (1991), this Court held that the exclusion of Latinos from a jury by the discriminatory use of peremptories by prosecutors would violate the *Batson* doctrine. And in *McCollum*, 112 S. Ct. at 2348, the Court stated, in the course of holding that criminal defendants may not use peremptory challenges in a racially discriminatory manner, that " 'constitutional considerations militate against the divisive assumption—as a *per se* rule—that justice in a court of law may turn upon the pigmentation of skin, *the accident of birth*, or the choice of religion.' " *Id.* (quoting *Ristaino v. Ross*, 424 U.S. 589, 596 n.8 (1976)) (emphasis supplied).[24] Gender, of course, is an immutable characteristic that flows from birth—and thus is clearly embraced within the Court's definition of those factors that should play no role in the dispensation of justice.

B. Peremptory Challenges Based Upon Gender Cannot Survive This Court's Heightened Scrutiny Because They Are Not Substantially Related to an Important Governmental Objective.

It is now well-settled that, under the Equal Protection Clause of the Fourteenth Amendment, classifications based on gender trigger a level of scrutiny that requires that the State show more than merely a "rational basis" for its actions—so called "heightened" scrutiny. *See, e.g., Mississippi Univ. for Women*, 458 U.S. at 724 (parties "seeking to uphold a statute that classifies individuals on

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[24] Several other post-*Batson* decisions demonstrate the appropriateness of expanding *Batson* beyond the circumstances of that case. *See Powers v. Ohio*, 111 S. Ct. at 1368 (criminal defendant of one race may challenge exclusion of jurors of a different race); *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. at 2089 (applying *Batson* to hold unlawful race discrimination in selection of civil petit jury).

the basis of their gender must carry the burden of showing an 'exceedingly persuasive justification' for the classification"). In *Mississippi University for Women*, a case involving an equal protection challenge to a state-supported university which excluded men from its nursing program, this Court stated that "the test for determining the validity of a gender-based classification . . . must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions." *Id.* at 725-26.

Heightened scrutiny for gender discrimination is warranted by the "long and unfortunate history of sex discrimination" in the United States, *Frontiero v. Richardson*, 411 U.S. at 684-85, as well exemplified by the exclusion of women from jury panels. As this Court recognized in *Frontiero*,

> since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . .'

Id. at 686 (quoting *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972)). To satisfy the heavy burden of the heightened scrutiny standard, the State must demonstrate here that discrimination based upon gender serves "important governmental objectives" and is "substantially related to the achievement of those objectives." *Craig v. Boren*, 429 U.S. at 197; *see also Mississippi Univ. for Women*, 458 U.S. at 724.

The State cannot in this case show the "exceedingly persuasive justification" required to meet the scrutiny required by the Equal Protection Clause. *Amici curiae* do

not challenge the common law (but not constitutionally guaranteed) right of the State or other litigants to exercise peremptory challenges in a manner reasonably designed to achieve the goal of an impartial jury.[25] However, the State's and other litigants' legitimate right to exercise peremptory challenges on the basis of a hunch, a suspicion, or some sense about the predilections of an individual panel member is not a free license to strike individuals that belong to a class of persons that this Court has previously determined is a protected class under the Equal Protection Clause. Challenges against women or men as a class are necessarily based on gender stereotypes, no less than challenges against African-Americans as a class are based on stereotypes about people of color. Allowing these stereotypes a role in the jury selection process infects that process with prejudice, stigmatizes the victims of such discrimination, undermines the credibility of the judicial process, and furthers no important state interest.[26] Gender-based strikes thus lack a "direct, substantial relationship" to the State's interest in an impartial jury since they perpetuate the "application of

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[25] *Swain v. Alabama*, 380 U.S. 202, 211-12 (1965), *overruled*, 476 U.S. 101 (1985).

[26] Since gender classifications in the exercise of peremptory challenges are "not substantially related to an important [governmental] objective," this Court "need not decide whether classifications based on gender are inherently suspect." *Mississippi Univ. for Women*, 458 U.S. at 724 n.9. Nonetheless, should the Court conclude that the use of gender-based peremptories does satisfy some important government objective and that such peremptories are substantially related to the achievement of that objective, *amici* urge the Court to hold that the use of gender to classify persons in connection with their ability to sit on juries warrants examination under a strict scrutiny test, requiring the State to show that its actions are narrowly tailored to serve a "compelling state interest." *See, e.g., Bernal v. Fainter*, 467 U.S. 216, 219 (1984). The use of peremptory challenges to exclude persons from juries based on their immutable characteristics serves no such interest, as this Court recognized in *Batson*.

traditional, often inaccurate, assumptions about the proper roles of men and women." *Mississippi Univ. for Women*, 458 U.S. at 725-26.[27]

The State argued to this Court in its brief in opposition to certiorari that gender-based peremptory strikes should be permitted because men are not a "cognizable group" entitled to protection under *Batson*. Opp. Cert. at 6, 14-15. The State clearly views the issue in this case too narrowly and misunderstands this Court's jurisprudence. That this case involves peremptory strikes "against males rather than against females does not exempt it from scrutiny or reduce the standard of review." *Mississippi Univ. for Women*, 458 U.S. at 723; *see also Caban v. Mohammed*, 441 U.S. 380, 394 (1979); *Orr v. Orr*, 440 U.S. 268, 279 (1979). Gender-based strikes against men as well as against women have been found to violate the Constitution.[28] Thus, not only does this case involve the perpetuation of stereotypes of women when litigants

[27] As this Court recently held in *McCollum*, 112 S. Ct. 2348, peremptory challenges based on stereotypes do not serve *any* legitimate purpose.

[28] *See, e.g., United States v. De Gross*, 960 F.2d 1433, 1442-43 (9th Cir. 1992) (holding that defendant's challenges of males and prosecution's challenges of females both established a *prima facie* case of gender discrimination); *City of Mandan v. Fern*, 1993 WL 208469 (N.D. June 16, 1993) (strikes against men); *People v. Irizarry*, 560 N.Y.S.2d 279 (N.Y. App. Div. 1990) (same). Moreover, there has been no claim that this case falls within that category of cases where the State's action is constitutionally permissible because it intentionally and directly compensates women for prior deprivations. *See, e.g., Califano v. Webster*, 430 U.S. 313, 318-21 (1977) (statutory classification which allowed women to eliminate more low-earning years than men in computation of social security benefits upheld because of workplace inequities); *Schlesinger v. Ballard*, 419 U.S. 498, 510-11 (1975) (federal statute providing more time to female Naval officers than to male Naval officers for promotion before mandatory discharge permissible based on limitations on females' service opportunities).

strike males,[29] but it necessarily involves the constitutionality of striking women because they are women.

C. Arguments Made Against the Extension of *Batson* to Gender-Based Peremptory Challenges Neither Satisfy the State's Burden Under the Equal Protection Clause Nor Demonstrate that *Batson*'s Protections Are Unnecessary.

The State may argue that the extension of *Batson* protections to gender discrimination will lead to the demise of the peremptory challenge and thereby undermine an important state interest in impartial juries. *Amici* do not agree. The Equal Protection Clause does not forbid state actors from drawing lawful classifications, and thus does not intrude on the legitimate exercise of the peremptory challenge based on characteristics of prospective jurors other than those classifications which this Court has determined merit heightened scrutiny. Thus, while it may be permissible to rely upon certain characteristics to make predictions about the behavior of a prospective juror, there are constitutional limits to the use of certain classifications as a proxy for individual judgment.

Further, there is no basis in *Batson* for concluding that the decision turned upon, and must therefore be limited to, the strict scrutiny afforded race classifications. Nowhere in that decision did this Court suggest that gender stereotypes are more acceptable than race stereotypes.

This Court's jurisprudence, which affords gender heightened scrutiny, offers limits on the *Batson* doctrine. Heightened scrutiny is not based simply on an arbitrary line between acceptable and unacceptable classifications, but

[29] *See, e.g., Challenges, supra* note 9, at 1938 ("[S]tereotypes of male and female characteristics tend to be binary and hence mutually reinforcing. Thus, women are implicated when a state actor stereotypes a prospective male juror as 'hardboiled,' and male jurors are affected in a similar way when female jurors are presumed to be 'emotional.'").

on this Court's assessment that certain characteristics warrant special protection under the Equal Protection Clause. Since both race-based and gender-based peremptories evoke a shared history of exclusion from political participation, *Batson*'s analysis equally applies to gender.

The State may also argue that allowing gender-based strikes is justified by administrative difficulties for courts that might result from an extension of *Batson*.[30] This Court has repeatedly "rejected administrative ease and convenience as sufficiently important objectives to justify gender-based classifications." *Craig v. Boren*, 429 U.S. at 198; *see also Frontiero v. Richardson*, 411 U.S. at 690.[31] In addition, the Ninth Circuit and numerous state court systems are already functioning in a setting where gender-based discrimination in the exercise of peremptory challenges has been found unconstitutional.[32]

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[30] This is precisely the argument that opponents of *Batson* raised in that case. This Court soundly rejected this argument. *Batson*, 476 U.S. at 99.

[31] Moreover, as with race stereotypes, if gender stereotypes "are the price of acceptance of a jury panel as fair, the price is too high to meet the standard of the Constitution." *Edmonson*, 111 S. Ct. at 2088; *McCollum*, 112 S. Ct. at 2358. One state supreme court framed the issue quite well in prohibiting gender-based peremptory strikes:

> We recognize the practical difficulties this will impose upon the trial courts. It would be a more happy situation if the courts could, as they have in the past, rely on the good faith of the prosecutors and defense counsel to exercise their peremptory challenges to achieve an impartial jury in a constitutionally permissible manner. Unfortunately, as *Batson, supra*, and the facts in this case demonstrate, that good faith is not always present. The fact that the matter is difficult does not do away with the compelling necessity that criminal jury trials be fair and impartial in appearance, and in fact, nor do away with the fact that the civil rights of everyone, the defendant, the jurors, and the citizenry in general, must be protected by the courts.

State v. Levinson, 795 P.2d 845, 850 (Haw. 1990).

[32] *See, e.g., De Gross*, 960 F.2d 1433; *Di Donato v. Santini*, 283 Cal. Rptr. 751 (Cal. Ct. App. 1991) (state constitutional grounds), *review denied*, 1991 Cal. LEXIS 4582 (Cal. Oct. 2, 1991); *State v. Levinson*, 795 P.2d 845 (Haw. 1990) (state constitutional grounds); *Tyler v. State*, 623 A.2d 648 (Md. Ct. App. 1993) (state consitutional grounds); *State v. Gonzales*, 808 P.2d 40 (N.M. Ct. App. 1991) (state constitutional grounds), *cert. denied*, 806 P.2d 65 (N.M. 1991); *City of Mandan v. Fern*, No. 920274, 1993 WL 208469 (N.D. June 16, 1993) (federal constitutional grounds); *Commonwealth v. Reid*, 424 N.E.2d 495 (Mass. 1981) (state constitutional grounds); *People v. Irizarry*, 560 N.Y.S.2d 279 (N.Y. App. Div. 1990) (federal constitutional grounds); *State v. Burch*, 830 P.2d 357 (Wash. Ct. App. 1992) (state and federal constitutional grounds).

The procedures set forth in *Batson* for testing the constitutionality of particular challenges—which have proven workable—require no modification when applied to the gender setting. A finding of a *prima facie* case of purposeful gender discrimination would be based on "all relevant circumstances" and, if a *prima facie* case is made, the burden would shift to the party exercising the strikes to "articulate a neutral explanation related to the particular case to be tried." 476 U.S. at 96-98.

The Fifth Circuit's recent opinion also provides no valid justification for limiting *Batson* to race-based peremptory challenges. *See United States v. Broussard*, 987 F.2d 215 (5th Cir. 1993) (declining to extend *Batson* to gender). The opinion disregards this Court's jurisprudence and the historical discrimination against women in the jury system. The Fifth Circuit draws the remarkable conclusion that *Batson* should not be extended to gender because " 'women are qualified as jurors in all the states,' " and because Congress in the Civil Rights Act of 1957 "assured that women could not be excluded from federal jury service." *Id.* at 220 (quoting *Taylor*, 419 U.S. at 533). The fact that women or men are not legally prohibited from jury service is irrelevant to a *Batson* analysis—and means nothing to a woman or man who has been stricken from a jury on the basis of gender. When *Batson* was decided, African-Americans also could serve on juries, but this Court recognized that *Batson* was neces-

sary to ensure an equal opportunity to participate. Indeed, this Court recognized that the Constitution requires "that we look beyond the face of the statute defining juror qualifications and also consider challenged selection practices to afford 'protection against action of the State through its administrative officers in effecting the prohibited discrimination.'" *Batson*, 476 U.S. at 88 (citations omitted). Similarly, the Court recognized that "the State may not draw up its jury lists pursuant to neutral procedures but then resort to discrimination at 'other stages in the selection process.'" *Id.; see also Powers*, 111 S. Ct. at 1369.

Further, it is no answer to claim, as the *Broussard* court did, that women are adequately protected under the principles of *Swain v. Alabama*. *See Broussard*, 987 F.2d at 219-20. In *Batson*, this Court specifically overruled *Swain*, which had held that the Equal Protection Clause requires a showing that prosecutors systematically excluded African-American jurors in "case after case." *Batson*, 476 U.S. at 91-93. *Swain* was rejected because it placed upon defendants a "crippling burden of proof" and made peremptory challenges "largely immune from constitutional scrutiny." *Id.* at 92-93.[33] Indeed, this Court concluded that for "evidentiary requirements to dictate that 'several must suffer discrimination' before one could object would be inconsistent with the promise of equal protection to all." *Batson*, 476 U.S. at 96 (citation omitted). Resurrection of *Swain* as a response to gender discrimination should be rejected for these same reasons.[34]

Finally, there is no basis for the conclusion that *Batson*'s protections need not be extended to gender because, unlike African-Americans, "[w]omen are not a numerical minority," and therefore are likely to be represented on a jury despite the discriminatory use of peremptory challenges. *Broussard*, 987 F.2d at 220. First, the present case demonstrates that it is quite possible to strike all members of one gender from a jury.[35] More importantly, the argument completely misses the point of *Batson* and its progeny, that exclusion of even *one* juror *for impermissible reasons* harms that juror and undermines public confidence in the fairness of the system. "An individual juror does not have a right to sit on any particular petit jury, but *he or she does possess the right not to be excluded from one on account of race*." *Powers*, 111 S. Ct. at 1370 (emphasis added).[36] No less than in the race

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[33] During the nearly twenty years between *Swain* and *Batson*, only two defendants ever demonstrated a *prima facie* case under *Swain*. *See* Marvin B. Steinberg, *The Case for Eliminating Peremptory Challenges*, 27 Crim. L. Bull., May-June 1991, at 216, 221 (citations omitted). Even in *Swain*, the Court concluded that petitioner had not satisfied his burden even though there was testimony that no black had ever served on a petit jury in the relevant county. *Swain*, 380 U.S. at 231-32 (Goldberg, J., joined by Warren, C.J., and Douglas, J., dissenting).

[34] While this Court invalidated under the Equal Protection Clause a state statute that banned African-Americans from serving on juries in 1880, *Strauder v. West Virginia*, 100 U.S. 303 (1880), it was nearly a century later before this Court prohibited the systematic exclusion of women from juries. *See Taylor v. Louisiana*, 419 U.S. 522 (1975). The adoption of *Swain* for gender—and thus its "crippling burden of proof," *Batson*, 476 U.S. at 92—would send the unfortunate message that women might have to wait another century to move from *Swain* to *Batson*.

[35] Of course, the ultimate composition of a particular jury has no bearing on the threshold issue of whether *Batson* should apply to gender, nor can it be dispositive of a litigant's *prima facie* case. There is no justification for allowing *Batson* to turn upon whether a litigant can successfully strike all the members of the particular group. If it did, a litigant could avoid *Batson* entirely by simply seating one African-American or one woman.

[36] *See also Batson*, 476 U.S. at 99 n.22 ("The standard we adopt under the Federal Constitution is designed to ensure that a State does not use peremptory challenges to strike *any* black juror because of his race.") (emphasis added). Lower courts have repeatedly agreed that "under *Batson*, the striking of a single black

context, stereotyping jurors or excluding even one juror on account of his or her gender harms that juror, and such an "overt wrong" subverts the integrity of the legal process.[37] As this Court recently recognized, "if a court allows jurors to be excluded because of group bias, it is a willing participant in a scheme that could only undermine the very foundation of our system of justice—our citizens' confidence in it." *McCollum*, 112 S. Ct. at 2354.

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juror for a racial reason violates the Equal Protection Clause, even where other blacks are seated . . . ." *United States v. Gordon*, 817 F.2d 1538, 1541 (11th Cir. 1987), *vacated in part on other grounds*, 836 F.2d 1312 (11th Cir.), *cert. dismissed*, 487 U.S. 1265 (1988); *cf. United States v. Johnson*, 873 F.2d 1137, 1139 (8th Cir. 1989). *See also United States v. Clemons*, 843 F.2d 741, 748 (3d Cir.) ("Nor can we conclude that the inclusion of blacks on a jury bars a prima facie case, especially where other facts and circumstances may constitute an inference of prosecutorial discrimination in the selection process."), *cert. denied*, 488 U.S. 835 (1988); *People v. Jenkins*, 75 N.Y.2d 550, 558, 554 N.E.2d 47, 51 (1990) ("Thus the fact that *all* black jurors were not removed by the prosecution's discriminatory use of peremptory challenges does not render the use against some any less a violation of *Batson*.").

[37] State courts have recognized that gender-based peremptory strikes may be impermissible even where a gender-mixed jury is ultimately seated. *See, e.g., City of Mandan v. Fern*, No. 920274, 1993 WL 208469 (N.D. June 16, 1993) (two men on jury after strikes against men); *Tyler v. State*, 623 A.2d 648 (Md. Ct. App. 1993), *rev'g, Eiland v. State*, 607 A.2d 42 (Md. Ct. Spec. App. 1992) (eight women on jury after strikes against women); *State v. Burch*, 830 P.2d 357 (Wash. Ct. App. 1992) (two women on jury after strikes against women), *review denied*, 1991 Cal. LEXIS 4582 (Cal. Oct. 2, 1991); *Di Donato v. Santini*, 283 Cal. Rptr. 751 (Cal. Ct. App. 1991) (four women on jury after strikes against women); *State v. Levinson*, 795 P.2d 845 (Haw. 1990) (one woman on jury after strikes against women); *State v. Gonzales*, 808 P.2d 40 (N.M. Ct. App. 1991) (one man on jury after strikes against men), *cert. denied*, 806 P.2d 65 (N.M. 1991); *People v. Blunt*, 561 N.Y.S.2d 90 (N.Y. App. Div. 1990) (four women on jury after strikes against women); *People v. Irizarry*, 560 N.Y.S.2d 279 (N.Y. App. Div. 1990) (one man on jury after strikes against men).

CONCLUSION

For the foregoing reasons, this Court should hold that gender-based peremptory challenges violate the Equal Protection Clause and issue the relief appropriate in this case.

Respectfully submitted,

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APPENDIX

APPENDIX

INDIVIDUAL STATEMENTS OF INTEREST OF *AMICI CURIAE*

National Women's Law Center

The National Women's Law Center ("Center") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, the Center has actively participated in litigation to secure the rights of women and has participated in major Supreme Court cases addressing women's right to equal protection under the law. The Center strongly believes that gender-based classifications which incorporate gender-based stereotypes have no place in a judicial system premised on fundamental principles of fairness and equality.

American Association of University Women

As a national organization of 130,000 women and men, the American Association of University Women ("AAUW") is strongly committed to promoting and achieving legal, social, educational and economic equity for women. AAUW supports basic constitutional and civil rights for all persons, and opposes all forms of discrimination.

American Civil Liberties Union

The American Civil Liberties Union ("ACLU") is a nationwide, non-profit, non-partisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU has appeared before this Court in numerous jury discrimination cases including *Batson v. Kentucky*. Through its Women's Rights Project, the ACLU has been in the forefront of the battle against gender discrimination.

Center for Women Policy Studies

The Center for Women Policy Studies was founded in 1972 as the first national policy research and advocacy institute focused exclusively on issues of social and economic justice for women. The Center conducts research and advocacy programs on sexual harassment and violence against women, work/family and "diversity" policies of employers, education, and other relevant issues.

Clearinghouse on Women's Issues

The Clearinghouse on Women's Issues ("CWI") was established in the early 1970's by a diverse group of women's organizations to provide a channel for dissemination of information on a variety of issues of mutual concern to all women. CWI is pleased to join this *amicus* brief. The position is consistent with our goals and concerns regarding discrimination based on gender and race.

Connecticut Women's Education and Legal Fund

The Connecticut Women's Education and Legal Fund is a non-profit women's rights organization. Our mission is to work through community education, training, public policy and legal strategies to eliminate sex discrimination and empower all women to be full and equal participants in society. We were incorporated in 1973, and have over 700 members. We seek to join this case as *amicus curiae* because we believe that sex-based peremptory strikes during jury selection perpetuate stereotypes and discrimination and deny equal protection to potential jurors as well as to litigants.

Equal Rights Advocates

Equal Rights Advocates ("ERA") is one of the country's oldest women's law centers dedicated to the empowerment of women through the establishment of their economic, social, and political equality. Beginning in 1974

as a teaching law firm specializing in issues of sex-based discrimination, ERA has evolved into a legal organization with a multifaceted approach to addressing women's issues including litigation, advice and counseling, public education and public policy initiatives.

League of Women Voters of the United States

The League of Women Voters of the United States ("LWVUS") is a nonpartisan, nonprofit, membership organization with members in all 50 states, the District of Columbia, Puerto Rico, and the Virgin Islands. The League of Women Voters of the United States supports equal rights for all regardless of sex. The League supports actions to bring laws into compliance with the Equal Rights Amendment. This includes the elimination of those laws that have the effect of discriminating on the basis of sex.

Mexican American Women's National Association ("MANA")

MANA's interest in this case has to do with our desire to eliminate any barriers against women of color in our system of justice. Sex-based challenges would particularly harm women of color whom we represent, thus the importance of a case like *J.E.B. v. T.B.* Sex-based challenges are as much a barrier to service on juries as are race-based challenges and it is our belief that they, too, should be ruled unconstitutional.

National Association of Black Women Attorneys

The National Association of Black Women Attorneys, Inc. ("NABWA") was formed in November, 1972. The goals set forth for the Association are: (1) to advance the practice of law; (2) to improve the administration of justice by increasing opportunities for black women to participate at all levels therein; (3) to increase the number of black women practicing law by developing programs for recruiting students and providing scholarships; and (4)

to advance the causes of civil and human rights for all citizens of the United States and its territories.

For twenty years the NABWA membership has aided in the preparation and development of black women for law schools. NABWA has a job bank, which is open to all. NABWA also endorses deserving and qualified applicants who seek judicial, political, administrative and other positions.

The Association's involvement covers the entire spectrum of legal activities, ranging from Government, industry, politics and private practice.

National Hook-Up of Black Women, Inc.

Founded in 1975, the National Hook-Up of Black Women ("NHBW") is an organization of black women from business, professional, and community-oriented disciplines representing all economic, educational, and social levels. The purpose of NHBW is to provide a communications network in support of black women who serve in organizational leadership positions, especially those elected or appointed to office and those wishing to elevate their status through educational and career ventures. NHBW also (1) works to form and implement a Black Women's Agenda that would provide representation for women, families, and communities and that would help surmount economic, educational, and social barriers; (2) supports efforts of the Congressional Black Caucus in utilizing the legislative process to work toward total equality of opportunity in society; (3) seeks to highlight the achievements and contributions of black women; (4) sponsors workshops; and (5) bestows community and leadership awards.

Northwest Women's Law Center

The Northwest Women's Law Center is a non-profit public interest legal organization in Seattle, Washington, that works to advance the legal rights of women

through litigation, education and legislative advocacy. The Law Center has been serving women throughout Washington state since 1978 and has recently expanded its litigation program to serve women in Alaska, Idaho, Oregon and Montana. One of the Law Center's priorities is the elimination of gender discrimination in all arenas—including the judicial system. To this end, we have taken the lead in the Northwest in eliminating gender bias in the courts and submitted an *amicus curiae* brief in a Washington state case challenging the constitutionality of exclusion of jurors based on their gender.

NOW Legal Defense and Education Fund

NOW Legal Defense and Education Fund ("NOW LDEF") is a national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization for Women. A major goal of NOW LDEF is the elimination of sex-based stereotypes, such as the stereotypes and generalizations that form the basis of gender-motivated peremptory challenges.

People for the American Way

People For The American Way ("People For") is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, People For now has over 300,000 members nationwide. People For has been actively involved in efforts to combat discrimination and promote the equal treatment of all persons, including participating in civil rights litigation and conducting programs and studies directed at reducing problems of bias, injustice and discrimination. People For joins this brief because it supports the protections against racial discrimination in jury selection established in *Batson v. Ken-*

tucky, and believes such protections should apply in the context of gender discrimination as well.

Women Employed

Women Employed is a national organization of working women, based in Chicago, with a membership of 2000. Since 1973, the organization has assisted thousands of working women with problems of sex discrimination. Women Employed works to empower women to improve their economic status and to remove barriers to economic equity through advocacy, direct service and public education. Women Employed strongly believes that discriminatory sex-based peremptory challenges rely on stereotypical views of women and men, and ultimately perpetuate a history of discrimination in the legal system, particularly against female jurors.

Women's Law Project

The Women's Law Project ("WLP") is a non-profit, feminist legal advocacy organization, located in Philadelphia. Founded in 1974, WLP works to abolish discrimination and injustice and to advance the legal and economic status of women and their families through litigation, public education, and individual counseling. During the past seventeen years of its existence, WLP's activities have included extensive work in the area of sex discrimination.

WLP has a strong interest in the eradication of sex-based peremptory challenges in the jury selection process. The Women's Law Project believes that the opinion in this case will set an important precedent for the legal rights of women.

Women's Legal Defense Fund

Formed in 1971, the Women's Legal Defense Fund ("WLDF") works in the courts, Congress, and the administrative branch of government to further public policy for

women and their families. WLDF has been an active participant in virtually all major sex discrimination cases before the Supreme Court, in countless cases in the lower federal courts, in congressional efforts to remedy sex discrimination, and in nationwide education efforts to inform policymakers and others about sex discrimination.